

القَوَاعِدُ الفِقهِيَّةُ

*Al-Qawâ'id Al-Fiqhiyyah*

(Legal Maxims of Islamic Jurisprudence)

A Translated Compilation

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## Part I.

لَمَعَةُ تَارِيخِيَّةٍ عَنِ الْقَوَائِدِ الْفِقْهِيَّةِ وَ  
أَهَمُّ كُتُبِ الْمَذَاهِبِ الْمُتَعَلِّقَةِ بِهَا  
مَصَادِرُ الْقَوَائِدِ الْفِقْهِيَّةِ، وَمُهِمَّتُهَا، وَمَكَانَتُهَا

A Historical Glance at Al-Qawâ'id Al-Fiqhiyyah  
The Most Significant Madhâhib Books  
Sources, mission and positions of Al-Qawâ'id Al-  
Fiqhiyyah

## Definition of *Al-Qâ'idah*

***Al-Qâ'idah* (القاعدة)** literally means a concrete or abstract maxim or base;

Is the ruling of *Al-Qâ'idah Al-Fiqhiyyah* all-inclusive (كُلِّي) or preponderant (غالب)?

In Ar-Rokkî's words: "*Al-Qâ'idah Al-Fiqhiyyah* is an all-inclusive rule based on legal evidence written accurately in comprehensive words, and it includes all or most particles, *Juz'iyât* (جُزْئِيَّاتٍ cases pertaining to *Fiqh*) which come under it."<sup>1</sup>

### **The first group of scholars:**

*Al-Qâ'idah* is an all-inclusive rule (or *Hukm*, حُكْم, which is a verdict pertaining to *Fiqh*)) which includes all the related jurisprudence (*fiqh*) branches (or *Furû*). Examples of these scholars are: Imams As-Sa'd At-Taftazânî<sup>2</sup>, Abû Al-Baqâ'<sup>3</sup> and Al-Maqqariy.<sup>4</sup>

### **The second group of scholars:**

*Al-Qâ'idah* is a preponderant rule which includes most of the related jurisprudence (*fiqh*) branches (or *Furû*).

<sup>1</sup> Dr. Muhammad **Ar-Rokkî**, *Nazariyyat-ut-Taq'îd Al-Fiqhiy wa Âtharuhâ fî Ikhtilâf Al-Fûqahâ'*, p. 48. Morocco, Casablanca :An-Najâh Al-Jadîdah Press, 1<sup>st</sup> ed., 1414/1994.

<sup>2</sup> Sa'd-ud-Dîn, Mas'ûd Ibn 'Umar Ibn 'Abdullâh a great scholar of Arabic sciences, (d.791A.H./approx.1389AD). See *Al-A'lâm* by Khair-ud-Dîn **Az-Zarkkalî**, Vol. 7, p. 219. Beirut, Lebanon: Dâr Al-'Ilm lel-Malayîn Press. Volume 5, 5<sup>th</sup> ed., 1411/1991.

<sup>3</sup> Ayyûb Ibn Mûsâ Al-Huseiny Al-Kafawî Al-Hanafiy among the magistrates of Al-Ahanâf (d.1094/1683). See *Al-A'lâm* by **Az-Zarkkalî**, Vol. 2, p. 38.

<sup>4</sup> Abû 'Abdullâh Muhammad Ibn Muhammad Ibn Ahmad Ibn Abû Bakr Al-Qurashiy At-Tilmisânî a great scholar of Mâlikkiyyah (d.758/1357). See *Al-A'lâm* by **Az-Zarkkalî**, Vol. 7, p. 37.

Examples of these scholars are: Imâm As-Subkkiy<sup>5</sup> and Imâm Al-Hamawiy.<sup>6</sup>

Imâm Ash-Shâtibiy supported a reconciliation between the two definitions, where If there were a particle jurisprudence matter (or *Juz'iyyah*) that were an exception to a maxim (or a *Qâ'idah*), that that would not cancel the comprehensiveness and the inclusion of such a *Qâ'idah*; for that particle (or *Juz'iyyah*) could be a branch of another *Qâ'idah*.<sup>7</sup>

***Legal maxims, or Al-Qawâ'id Al-Fiqhiyyah* are different in scholars agreement on them, and in the level of their inclusiveness.**

***Legal maxims, or Al-Qawâ'id Al-Fiqhiyyah* can be divided into four types:**

**1. *Al-Qawâ'id Al-Qulliyyah Al-Kubrâ* (القَوَاعِدُ الْكُلِّيَّةُ الْكُبْرَى, Normative Legal Maxims)**

- Agreeable to all scholars and all Madhâhib.
- Have the highest degree of inclusiveness (of related branches of *Fiqh*).

Example:

” الْمَشَقَّةُ تَجْلِبُ التَّيْسِيرَ ”

**” (*Al-mashaqah tajleb at-taiysîr*): Hardship begets ease.”**

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<sup>5</sup> ‘Abdul-Wahhâb Ibn ‘Alî Ibn ‘Abdul-Kâfî Abû Nasr among the greatest magistrates, historians and researchers of his time born in Cairo (d.771/1370). See Al-A‘lâm by **Az-Zarkkalî**, Vol. 4, p. 148.

<sup>6</sup> Ahmad Ibn Muhammad Mekkî Abû Al-‘Abbâs Shihâb-du-Dîn AL-Huseiniy one of the scholars of Hanafiyyah (d.1098/1687). See Al-A‘lâm by **Az-Zarkkalî**, Vol. 1, p. 239.

<sup>7</sup> Dr. Muhammad Sedkkî Ibn Ahmad Ibn Muhammad **Al-Bornû**, Al-Wajîz fî Idâh Qawâ'id Al-Fiqh Al-Kulliyyah, pp.16-21. Beirut, Lebanon: Ar-Risâlah Foundation Press, 1416/1996.

## 2. *Al-Qawâ'id Al- Juz'iyyah Al-Kubrâ* (القَوَاعِدُ الْجُزْئِيَّةُ الْكُبْرَى, **Partial Normative Legal Maxims**)

- Agreeable to all scholars and all Madhâhib.
- Have the highest degree of inclusiveness (of related branches of *Fiqh*).
- Fall under one of the Normative legal Maxims or *Al- Qawâ'id Qulliyyah Kubrâ*,

Example:

”الضَّرُورَاتُ تُبِيحُ الْمَحْظُورَاتِ”

“(Ad-darurât tubîh al-mahzurât) Necessities permit the prohibited”

Falls under the *Qâ'idah*

” الْمَشَقَّةُ تَجْلِبُ التَّيْسِيرَ ”

“(Al-mashaqah tajleb at-taiysîr) Hardship begets ease.”

## 3. *Al-Qawâ'id Al-Qulliyyah Ghair Al-Kubrâ* (القَوَاعِدُ الْكُلِّيَّةُ غَيْرُ الْكُبْرَى, **Non-Normative Legal Maxims**)

- Agreeable to most scholars and Madhâhib.
- Have a high degree of inclusiveness (of related branches of *Fiqh*).

Example:

”التَّصَرُّفُ عَلَى الرَّعْيَةِ مَنْوُطٌ بِالْمَصْلَحَةِ”

“(At-tasarruf ‘alâ ar-ra’iyyah manût be al-maslahah) Rulers' decisions must be in favor of the people. “

**4. ADDawâbit Al- Fiqhiyyah (called ADDawâbit (الضوابط, controllers): the plural of ADDâbit (الضابط, a controller)) or The jurisprudential Controllers**

- Difference in opinions about them by scholars.
- Mostly related to specific Madhâhab or school of thought.
- Have a low degree of inclusiveness (of related branches of *Fiqh*).

Example:

” كُلُّ كَفَّارَةٍ سَبَبُهَا مَعْصِيَةٌ فَهِيَ عَلَى الْفَوْرِ ”

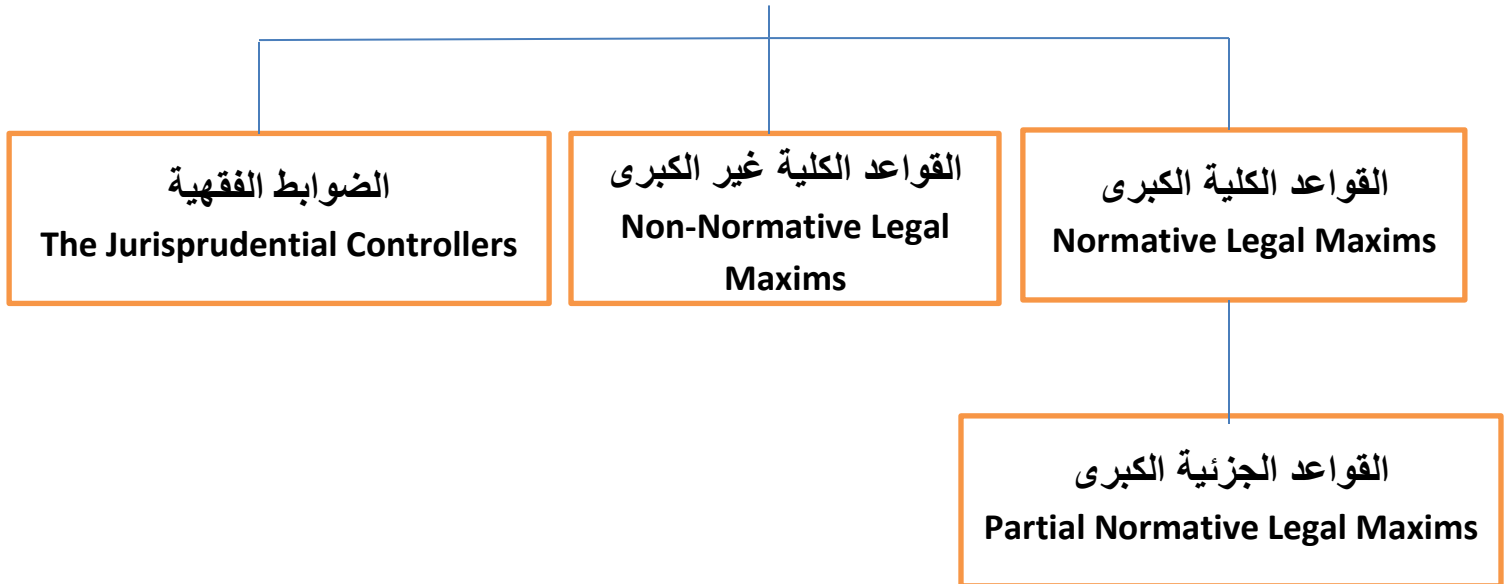
**(Kull kaffarah sababuha ma'seiyyah fahiya 'ala al-fawr): Every Kaffârah<sup>8</sup> by disobedience is supposed to be fulfilled immediately. ”<sup>9</sup>**

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<sup>8</sup> Certain punishment upon the people who committed sins. Some kinds of *Kaffârah* are: Fasting, feeding the poor and freeing a slave.

<sup>9</sup> **Al-Bornû**, Al-Wajîz, pp. 26-28.

# Islamic Jurisprudential Maxims



# Chapter 1

نَشْأَةُ الْقَوَائِدِ الْفِقْهِيَّةِ وَ كَيْفَ تَطَوَّرَتْ

**The Establishment of *Al-Qawâ'id Al-Fiqhiyyah* and How they  
Developed**



## مَرْحَلَةُ نَشْأَةِ الْفَوَائِدِ الْفِقْهِيَّةِ

### The Foundation stage

The foundation of *Al- Qawâ'id Fiqhiyyah* is primarily found in the Noble Qur'an, the authentic Sunnah of the Messenger of Allâh صلى الله عليه وسلم, the saying of the (الصَّحَابَةُ, the companions) رضي الله عنهم, and the saying of the *Tabe'ûn* (التَّابِعُونَ, Followers of the Companions).

Examples:

Narrated Abû Sa'îd Al-Khudrî رضي الله عنه: Allâh's Messenger صلى الله عليه وسلم said:

" لَا ضَرَرَ وَلَا ضِرَارَ فِي الْإِسْلَامِ "

**(*lâ darar wa lâ dirâr fî al-Islâm*) Islâm forbids people to cause detriment on themselves or on others"**<sup>10</sup>

‘Umar Ibn Al-Khattâb said:

"مَقَاطِعُ الْحُقُوقِ عِنْدَ الشُّرُوطِ"

**(*Maqâti' al-huqûq 'ind ash-shurûtt*) Rights decisively lean on provisions."**<sup>11</sup>

‘Alî Ibn Abû Tâlib said:

<sup>10</sup> It is *Sahîh* (authentic) Hadîth according to the criterion of *Sahîh Muslim* but he did not report it. See "Talkhîs Al-Mustadrak 'alâ as-Sahîhiyyin," chapter: Bargains, 2345.ed. by Muhammad Ibn Ahmad Ibn 'Uthmân Ibn Qiymâz **adh-Dhahabî** (d.748/1347) in *Al-Mustadrak 'alâ As-Sahîhiyyin*, by Muhammad Ibn 'Abdullâh Abû 'Abdullâh **Al-Hâkim** an-Niysabouriy. Beirut, Lebanon: Dâr Al-Kutub Al-'Ilmiyyah Press, Volume 4, 1<sup>st</sup>. ed. 1411/1990.

<sup>11</sup> Muhammad Ibn Ismâ'îl Abû 'Abdullâh Al-Ja'fî **Al-Bukhârî**, *Al-Jâmi' As-Sahîh Al-Mukhtasar (Sahîh Al-Bukharî)*, chapter: 6 "Conditions of *Mahr* at marriage contract", p. 969, Vol.2.. Verified by Dr. Mustafâ Dîb Al-Baghâ. Beirut, Lebanon: Dâr Ibn Kathîr Press. Volume 6, 3<sup>rd</sup>. ed., 1407/1987.

”مَنْ قَاسَمَ الرَّبِّحَ فَلَا ضَمَانَ عَلَيْهِ”

**(*Mann qâsam ar-rebh falâ damân ‘alaih*) There is no guarantee upon whom shares profits”<sup>12</sup>, and so on.**

From the (التَّابِعُونَ, Followers of the Companions), Shuraih Ibn Al-Hâarith Al-Kindiy (d.76/695) said:

”مَنْ شَرَطَ طَائِعًا غَيْرَ مُكْرَهٍ فَهُوَ عَلَيْهِ”

**(*Mann sharat tâ’i’an ghair mukrah fahuwa ‘aliyh*) Whoever optionally, and without coercion, stipulates a certain condition on himself, must fulfill this condition.”**

Jubair Ibn Nu‘aim<sup>13</sup> said:

”مَنْ أَقَرَّ عِنْدَنَا بِشَيْءٍ أَلْزَمْنَاهُ إِيَّاهُ”

**(*Mann aqarr ‘indânâ be shai’ alzmnâh iyâh*) Whoever states something, should be responsible for it”<sup>14</sup>, and so on.**

After (التَّابِعُونَ, the followers of the Companions), many legal maxims were initiated or repeated by different scholars in their books. Examples can be found in the book: *Al-Kharâdj*, written by Imam Abû Yusuf<sup>15</sup>:

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<sup>12</sup> Abû Bakr ibn Hammâm as-San‘âniy ‘**Abdur-Razzâq**, *Musannaf ‘Abdur-Razzâq*, chapter: Sales 15113, verified by Habîbur-Rahmân Al-A‘zamî. Beirut, Al-Maktab Al-Islâmiy, 2nd. Ed. Vol. 11.

<sup>13</sup> Ibn Murrah Al-Hadramiy Al-Masriy a great magistrate in Egypt (d.137/754). See *Al-A‘lâm* by **Az-Zarkkalî**, Vol. 2, p. 326.

<sup>14</sup> Abû Bakr Muhammad ibn Khalaf ibn Hiyân ibn Sadaqah Ad-Dabbiy Al-Baghdâdî **Wakî‘**, *Akhbâr Al-Qudâh*, verified and authenticated by ‘Abdul-‘Azîz Al-Marâghî, vol.1, p. 321. Cairo, Egypt: Al-Maktabah At-Tejariyyah Al-Kubrâ Press. Volume 3, 1<sup>st</sup>. ed., 1366/1947.

”التَّعْزِيرُ إِلَى الْإِمَامِ عَلَى قَدْرِ عِظَمِ الْجُرْمِ وَصِغَرِهِ”

**(*At-ta'zîr ilâ al-imâm 'alâ qadr 'izam al-jurm wa seghareh*)**

**Discretionary punishment entrusted with the state leader relies on the extent of the crime.”<sup>16</sup>**

”كُلُّ مَنْ مَاتَ مِنَ الْمُسْلِمِينَ لَا وَارِثَ لَهُ فَمَالُهُ لِبَيْتِ الْمَالِ”

**(*Koll mann mât min al-Muslimîn lâ wârith lah fa mâluh le bait al-mâl*)**

**Should a Muslim die and have no one to inherit him, his wealth is assigned to the public treasury of a Muslim state.”<sup>17</sup>**

Other examples can be found in the book: Al-Asl, written by Imâm Muhammad Ibn Al-Hasan:<sup>18</sup>

”كَوْنِ الْوَاحِدُ حُجَّةً فِي أَمْرِ الدِّينِ إِذَا كَانَ عَدْلًا”

**(*Kawn al-wâhid hujjah fî amr ad-dîn idhâ kân 'adl*) For one's words to be accepted, one must be honest and have a good reputation in the matter of religion”<sup>19</sup>**

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<sup>15</sup> Ya'qûb Ibn Ibrâhîm Ibn Habîb Al-Ansâriy Al-Kûfiy a close friend and disciple of Abû Hanîfah born in Kûfah, Baghdâd (d.182/798). See Al-A'âm by **Az-Zarkkalî**, Vol. 8, p. 193.

<sup>16</sup> Ya'qûb Ibn Ibrâhîm **Abû Yusuf**, Al-Kharâj, vol.1, p. 182. Cairo, Egypt: As-Salafiyyah Press.

<sup>17</sup> **Abû Yusuf**, Al-Kharâj, p.202.

<sup>18</sup> Muhammad Ibn Al-Hasan Ibn Farqad Al-Shaibâniy a close friend and disciple of Abû Hanîfah was born in Kûfah Baghdâd (d.189/805). See Shazarât-udh-Dhahab by **Ibn Al-'Imâd**, Vol. 2, pp. 409-410.

<sup>19</sup> Muhammad Ibn Al-Hasan **Ash-Shiybâniy**, Al-Asl, Vol. 3, p, verified by Abûl-Wafâ' Al-Afghâniy. India, Hyderabad. Volume 4, 1<sup>st</sup>, ed.

In the same manner, Imâm ash-Shâfi'î (d.204/819) wrote his book Al-Omm from which many *Qawâ'id* can be extracted:

”الرُّخْصُ لَا يَتَعَدَى بِهَا مَوَاضِعُهَا”

**(*Ar-rukhas lâ yuta'd behâ mawadi'hâ*) Allowances of Allâh must not go beyond their limits”<sup>20</sup>**

”الرُّخْصُ لَا تَكُونُ إِلَّا لِمُطِيعٍ فَأَمَّا الْعَاصِي فَلَا”

**(*Ar-rukhas lâ takûn illâ le mutî' fa amma al 'âsiy falâ*) The allowances of Allâh are restricted for the obedient only.”<sup>21</sup>**

Ma'âlim As-Sunan, written by Imâm Suleimân Ahmad Ibn Muhammad Al-Khattâbî Al-Bustiy (d.388/998), is one of many books that explained the Sunnah and contained many of the legal maxims. An example would be:

”الشَّكُّ لَا يُزَاحِمُ الْيَقِينَ”

**(*Ash-shakk lâ yazham al-yaqîn*) Doubt does not refute certainty.”**

The author deducted it from the Hadîth:

حَدَّثَنَا عَلِيٌّ قَالَ حَدَّثَنَا سُفْيَانٌ قَالَ حَدَّثَنَا الزُّهْرِيُّ عَنْ سَعِيدِ بْنِ الْمُسَيْبِ عَنْ عَبَّادِ بْنِ تَمِيمٍ عَنْ عَمِّهِ : أَنَّهُ شَكََا إِلَى رَسُولِ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ الرَّجُلُ الَّذِي يُخَيِّلُ إِلَيْهِ أَنَّهُ يَجِدُ الشَّيْءَ فِي الصَّلَاةِ ؟ فَقَالَ : ( لَا يَنْفَقَل - أَوْ لَا يَنْصَرَفَ - حَتَّى يَسْمَعَ صَوْتًا أَوْ يَجِدَ رِيحًا ).

<sup>20</sup> Imâm Muhammad Ibn Idrîs **Ash-Shafi'**, Al-Omm, Vol. 1, p. 80. Beirut, Lebanon: Dâr Al-Ma'rîfah Press. Volume 8, ed., 1393/1973.

<sup>21</sup> The previous source, Vol. 1, p. 226.

Narrated ‘Alî that Suf yân that Az-Zuhrî that Sa’îd ibn al-Musiyb that ‘Abbâd Ibn Tamîm's cousin رضي الله عنهما that the Prophet صلى الله عليه وسلم had advised a person who would continuously imagine something happening to him in his Salâh. “Should an individual imagine something happening to him in his Salâh, he should not leave his Salâh unless he hears sound or smells something”.<sup>22</sup>

Another example is the book, At-Tamhêd lemâ fî Al-Muwatt’ men Al-Ma’ânî wa Al-Asanîd, written by Imâm Abû ‘Umar Ibn ‘Abdul-Bar Al-Qurtubiy Al-Malikiy (d.463/1070) also paid more attention to *Al-Qawâ'id Al-Fiqhiyyah*. Here, one of its *Qawâ'id*:

”مَنْ وَجَبَ لَهُ شَيْءٌ مِنَ الْأَشْيَاءِ لَمْ يُدْفَعْ عَنْهُ وَلَمْ يُتَّصَرَّ عَلَيْهِ إِلَّا بِإِذْنِهِ”  
**(Mann wajib lahu shai’ men al-ashya’ lam udf’ ‘anh wa lam utasawr ‘alaih illâ be idhnih)** Should one have a right, this right must not be extracted from him except by his permission.”

The author inferred it from the Hadîth:

حَدَّثَنَا عَبْدُ اللَّهِ بْنُ يُوسُفَ أَخْبَرَنَا مَالِكٌ عَنْ أَبِي حَازِمٍ بْنِ دِينَارٍ عَنْ سَهْلِ بْنِ سَعْدٍ السَّاعِدِيِّ رَضِيَ اللَّهُ عَنْهُ: أَنَّ رَسُولَ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ أُتِيَ بِشَرَابٍ فَشَرِبَ مِنْهُ وَعَنْ يَمِينِهِ غُلَامٌ وَعَنْ يَسَارِهِ الْأَشْيَاخُ فَقَالَ لِلْغُلَامِ: ( أَتَأْذُنُ لِي أَنْ أُعْطِيَ هَؤُلَاءِ ). فَقَالَ الْغُلَامُ وَاللَّهِ يَا رَسُولَ اللَّهِ لَا أُؤْثِرُ بِنَصِيبِي مِنْكَ أَحَدًا . قَالَ فَتَلَّهُ رَسُولُ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ فِي يَدِهِ .

Narrated ‘Abdullâh ibn Yusuf that Mâlik that Abî Hâzim ibn Dinâr that Sahl Ibn Sa’d as-Sâ’idî رضي الله عنه said:

A drink of (milk, water, and so on) was offered to Allâh's Messenger صلى الله عليه وسلم and after he drank some of it, he wished to give the elder persons sitting on

<sup>22</sup> Sahîh Al-Bukhârî, chapter: Al-Wudû’ (Ablution), 112.

his left side first, but there was a young man (or a boy) sitting on his right side. Allâh's Messenger صلى الله عليه وسلم asked the young man, “Could I be excused from giving you first (the drink)?”, “No, by Allâh, O Allâh's Messenger! I cannot prefer others to drink after you directly over me,” the young man has kindly given an excuse. Therefore, Allâh's Prophet صلى الله عليه وسلم gave it to him.<sup>23</sup>

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<sup>23</sup> Sahîh Al-Bukhârî, chapter: The Oppressions, 2319.

## The Recording Stage

### The Fourth Century

History has testified that jurists of Hanafiy *Madhhab* preceded others in collecting, paraphrasing and recording *Al-Qawâ'id Al-Fiqhiyyah* and the *Dawâbit* (controllers) of *Fiqh*. Imâm Abû Tâhir Ad-Dabâs<sup>24</sup> had collected seventeen *Qâ'idah Qulliyyah* as Imâm As-Seyûtî and Imâm Ibn Nujaim told us. Imâm Al-Karkhiy, Ad-Dabâs's friend, might have recorded these *Qawâ'id* and added to other *Qawâ'id* to be thirty-nine in his book (*Usûl Al-Karkhiy*) which was the first work in this field. Furthermore, Imâm Muhammad Ibn Hârîth Al-Khushnî Al-Malikiy (d.361/971) wrote a book under the title "*Usûl Al-Futyâ*" including more *Qawâ'id* and wide-ranging subjects of *Fiqh*.

### The fifth Century

In that time, Imâm Ad-Dabûsiy 'Ubiydullâh Ibn 'Umar Ibn 'Îsâ Al-Qâdî called Abû Zaid Ad-Dabûsiy (d.430/1038) added a great scientific fortune in his book *Ta'sîs An-Nazar*. In addition, Imâm Al-Haramain 'Abdul-Malik Ibn 'Abdullâh Ibn Yusuf Ash-Shâfi'iy Imâm Al-Haramain Al-Juwainî (d.478/1085) methodologically planted a series of *Al-Qawâ'id Al-Fiqhiyyah* in his book *Al-Gheyâthî*,

### The Sixth Century

This period had more than a few written works, following are some of them:

- a) *Idâh Al-Qawâ'id* by Imâm 'Alâ'-ud-Dîn Muhammad Ibn Ahmad As-Samarqandiy (d.570/1174) and,

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<sup>24</sup> Muhammad Ibn Muhammad Ibn Sufyân collected 17 *Qâ'idah* of Hanafiy *Madhhab*, see *Tabaqât Al-Fuqahâ'* by Abû Is-hâq Ibrâhîm Ibn 'Alî **Ash-Shirâzî**, p.142. Verified by 'Ihsân 'Abbâs. Beirut, Lebanon: Dâr ar-Râ'id Al-'Arabiyy Press, 1<sup>st</sup>. ed., 1389/1970.

- b) **Al-Muqadimât wa Al-Mumahidât** by Imâm Abû Al-Walîd Muhammad Ibn Ahmad Ibn Rushed (d.520/1126).

Besides, Imâm Fakhr-ud-Dîn Al-Farghaniy Al-Hasan Ibn Mansûr Ibn Mahmûd, called Qadikhân, (d.592/1159) were among those who explicated books of *Al-Qawâ'id Al-Fiqhiyyah*.

### **The Seventh Century**

The science of *Al-Qawâ'id Al-Fiqhiyyah* in this period, had crystallized but had not yet reached maturity. The greatest writers at this time were:

- a) Imâm Mu'în-ud-Dîn Abû Muhammad Ibn Ibrahîm Al-Jajarmiy As-Sahlakiy Ash-Shâfi'iy (d.613/1216) in his book **Al-Qawâ'id Al-Fiqhiyyah fî Furû' Ash-Shafi'iyyah**,
- b) Imâm 'Izz-ud-Dîn Ibn 'Abdus-Salâm (d.660/1261), in his book **Qawâ'id Al-Ahkâm fî Masâlih Al-Anâm**,
- c) Imâm Muhammad Ibn 'Abdullâh Ibn Râshid Al-Bakrî Al-Qafasî (d.736/1336) in his book, **Al-Madhhab fî Dabt Qawâ'id Al-Madhhab** and,
- d) Imâm Abû Al-Mahâmid Mahmûd Ibn Ahmad Ibn 'Abd-us-Sayed Jamâl-ud-Dîn Al-Husairî (d.363/973) in his book **At-Tahrîr Sharh Al-Jâmi' Al-Kabîr**.

The book, in addition, **Al-Majmû' Sharh Al-Madhhab** by Imâm Abû Zakariyyah Muhiy-ud-Dîn Yahyâ Ibn Sharaf an-Nawawî (d.676/1277) and the book **Anwâr AL-Borûq fî Anwâ' Al-Furûq** by Imâm Shihâb-ud-Dîn Al-Qarâfiy is said to have numbers of *Qawâ'id*.

### **The Eighth Century**

Recording the science of *Al-Qawâ'id Al-Fiqhiyyah* flourished in this century and it became the golden age of this field of knowledge, and scholars of Shâfi'iyah were in advance of other scholars. Examples were as follows:



- a) **Al-Ashbâh Wan-Nazâ'ir** by Ibn Al-Wakîl Ash-Shâfi'iy(d.716/1316),
- b) **Majmû' Al-Fatâwâ** by Ahmad Ibn 'Abdul-Halîm Ibn 'Abdus-Salâm Ibn 'Abdullâh Ibn Tiymiyyah 'Abdul-Halîm Ibn Tiymiyyah (d.728/1350),
- c) **Al-Qawâ'id** by Al-Maqqariy Al-Malikiy (d.758/1328),
- d) **Al-Ashbâh Wan-Nazâ'ir** by Tâjj-ud-Dîn As-Subkkiy (d.771/1369),
- e) **Al-Manthûr fî Al-Qawâ'id** by Badr-ud-Dîn Muhammad Ibn Bahâdir Ibn 'Abdullâh Az-Zarkkashiy (d.794/1391),
- f) **Al-Qawâ'id fî Al-Fiqh** by Zain-ud-Dîn 'Abdur-Rahmân Shihâb-ud-Dîn Ahmad Ibn Rajab Al-Hanbaliy (d.794/1391) and,
- g) **Al-Qawâ'id fî Al-Furû'** by 'Ali Ibn 'Uthmân Al-Ghazzî, the Damascene and Hanafiyy, (d.799/1369) are the most significant books of this stage.

## **The Ninth Century**

Like the previous phase, a significant number of new books were authored:

- a) **Al-Ashbâsh Wan-Nazâ'ir** by Ibn Al-Mulaqqen Serâj-ud-Dîn Abû Hafs 'Umar Ibn Abû Al-Hasan 'Alî Ibn Ahmad Ibn Muhammad Ibn 'Abdullâh (d.804/1401),<sup>25</sup>
- b) **Asna Al-Maqâsid fî Tahrîr Al-Qawâ'id** by Ibn Al-Khadr Muhammad Ibn Muhammad Az-Zubairiy Al-'Aithariy (d.808/1405),<sup>26</sup>
- c) **Al-Qawâ'id Al-Manzûmah** by Shihâb-ud-Dîn Ahmad Ibn Muhammad Ibn 'Imâd Al-Masriy Ibn Al-Hâ'im Al-Maqdesiy (d.815/1412),<sup>27</sup>

<sup>25</sup> Abul-Falâh 'Abdul-Hiy **Ibn Al-'Imâd**, *Shazarât-udh-Dhahab fî Akhbâr men Dhahab*, Vol. 9, p. 71. *Shazarât-udh-Dhahab fî Akhbâr man Dhahab*, verified by Mahmûd Al-Arna'ût and authenticated by 'Abdul-Qâdir Al-Arna'ût. Damascus: Dâr-Ibn Kathîr Press, Volume 11, 1<sup>st</sup>. ed. 1406/1986.

<sup>26</sup> The previous source, Vol. 9, p. 117.

- d) **Al-Qawâ'id** by Taqiy-ud-Dîn Abû Bakr Al-Husniy (d.829/1452),<sup>28</sup>
- e) **Nazm Adh-Dhkhâ'ir fî Al-Ashbâh Wan-Nazâ'ir** by Sharaf-ud-Dîn 'Abdur-Rahman Ibn 'Alî Ibn Is-hâq Al-Khalîliy Al-Muqdesiy, called Shuqair, (d.876/1471) and,
- f) **Al-Qawâ'id wa Ad-Dawâbit** by Yusuf Ibn Hasan Ibn Ahmad called Ibn Al-Mabred As-Sâlahî 'Abdul-Hâdî (d.880/1475).

### **The Tenth Century**

- a) Imâm Jalâlud-dîn as-Seyûtî (d.911/1505) who collected scattered *Qawâ'id* in his book **Al-Ashbâh Wan-Nazâ'ir**,
- b) Imâm Abû Al-Hasan Ar-Raqâq An-Najîbiy Al-Malikiy (d.912/1506) who rearranged *Al-Qawâ'id* from the old books and
- c) Imâm Ibn Nujaim (d.970/1562) were the prominent scholars who emerged during this century.

Recording, organizing and paraphrasing *Al-Qawâ'id Al-Fiqhiyyah* gradually became successful, but they were mixed with other sciences. The most significant event of the last part of the 11<sup>th</sup> century A.H. was the collecting of *Al-Qawâ'id Al-Fiqhiyyah* and putting them in **Majallat Al-Ahkâm Al-'Adliyyah** by the prominent jurists in the age of Sultan 'Abdul-'Azîz Khân Al-'Uthmâniy so as to be applied as laws in the different courts. The *Majallah* helped to instigate and further the movement of *Al-Qawâ'id Al-Fiqhiyyah*. It included 1851 articles in 16 volumes, and was explicated more than once in different works:

- a) **Mir'ât Majallatul-Ahkâm Al-'Adliyyah** by Su'ûd Afandî in Arabic, but the *Qawâ'id* were written in Turkish, and published in (1299/1881).

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<sup>27</sup> The previous source, Vol. 9, p. 163.

<sup>28</sup> The previous source, Vol. 9, p. 273.

- b) **Durar Al-Hûkkâm Sharh Majallat Al-Ahkâm** by ‘Alî Hiydar, it was translated from Turkish to Arabic by Fahmî Al-Husainî, a lawyer.
- c) **Sharh Al-Majallah** was recorded by Imâm Khâlid Ibn Muhammad Ibn ‘Abdus-Sattâr Al-Atâsî (d.1326/1908) and his son Muhammad completed this work after his father's death.

## أَهَمُّ كُتُبِ الْمَذَاهِبِ الْمُتَعَلِّقَةِ بِالْقَوَائِدِ الْفِقْهِيَّةِ

### The Most Significant *Madhâhib* Books

#### الْمَذْهَبُ الْحَنَفِيُّ

### Hanafi *Madhhab*

The Hanafi *Madhhab* is considered the oldest *Madhhab* and it has a number of books in this field:

- a) **Usûl Al-Karkhiy** was written by Imâm ‘Abaidullâh Ibn Al-Hasan Ibn Dalâl known as Abû Al-Hasan Al-Karkhiy from Iraq (d.340/951). Each *Qâ'idah* begins with a word “*Al-Asl* (in principal)” and includes 36 *Qâ'idah*.<sup>29</sup>
- b) **Ta'sîs An-Nazar** was written by ‘Ubaidullâh Ibn ‘Umar Ibn ‘Îsâ Al-Qâdî called Abû Zaid Ad-Dabûsiy (d.430/951) from ad-Dabûsiyyah (a small town), between Bukharâ and Samarqand, and the book comprised 68 *Qâ'idah*.<sup>30</sup>
- c) **Al-Ashbâh Wan-Nazâ'ir** was written by Imâm Zain-ud-Dîn Ibn Ibrâhîm Ibn Muhammad called Ibn Nujaim (d.970/1563) from Egypt. This book includes 25 *Qâ'idah*<sup>31</sup> and it was explicated and commented by 25 books; some of them are:

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<sup>29</sup> Muhammad ‘Abd-ul-Hiy Ibn Muhammad Ibn ‘Abd-ul-Hâlîm **Al-Laknawî**, “Al-Fawâid Al-Bahiyyah fî Tarâjim Al-Hanafiyyah,” pp. 108-109, in Al-Qawâ'id Al-Fiqhiyyah Mafhûmuhâ Nasha'tuhâ Tatawuruhâ Drâsit Mu'alafâtuhâ Adillatuhâ Muhemmatuhâ Tatbiqâtuhâ, ed. by Dr. ‘Alî Ahmad **An-Nadawî**, pp. 162-163. Damascus: Dâr Al-Qalam Press, 6<sup>th</sup>. ed., 1425/2004.

<sup>30</sup> **Az-Zarkkalî**, Al-A'lâm, Vol. 4, p. 109.

<sup>31</sup> “Al-Fawâid Al-Bahiyyah,” by **Al-Laknawî**, p. 135, in Al-Qawâ'id Al-Fiqhiyyah, ed. by Dr. **An-Nadawî**, pp. 169-170.

- **Tanwîr Al-Basâ'ir 'alâ Al-Ashbâh Wan-Nazâ'ir** was written by Imâm 'Abdul-Qâdir Ibn Barakât Ibn Ibrahîm known as Sharaf-ud-Dîn Al-Ghazzî or Ibn Habîb (d.1005/1597)<sup>32</sup>and
- **Ghamz 'Uyûn Al-Basâ'ir Sharh Al-Ashbâh Wan-Nazâ'ir** was written by Imâm Ahmad Ibn Muhammad Al-Hamawiy (d.1098/1687).<sup>33</sup>
- d) **Khâtimet Majâmi' Al-Haqâ'iq** was written by Imâm Muhammad Ibn Muhammad Ibn Mustafâ Al-Khademî known as Abû Sa'îd Al-Khademî (d.1176/1762).<sup>34</sup>
- e) **Qawâ'id Majallat-ul-Ahkâm Al-'Adliyyah** was written by a committee of scholars of the Ottoman State.

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<sup>32</sup> **Az-Zarkkalî**, "Al-A'lâm," Vol. 4, p. 162, in Al-Qawâ'id Al-Fiqhiyyah, ed. by Dr. **An-Nadawî**, p.172.

<sup>33</sup> 'Abdullâh Mustafâ **Al-Marâghî**, "Al-Fath Al-Mubîn fî Tabaqât Al-Usûliyyîn," Vol. 3, p. 110, in Al-Qawâ'id Al-Fiqhiyyah, ed. by Dr. **An-Nadawî**, pp.172-173.

<sup>34</sup> "Al-Fath Al-Mubîn," by **Al-Marâghî**, Vol. 3, p. 116, in Al-Qawâ'id Al-Fiqhiyyah, ed. by Dr. **An-Nadawî**, pp.176-177.

## المَذْهَبُ المَالِكِي

### **Mâlikiy Madhhab**

- a) **Usûl Al-Futiyyâ fî Al-Fiqh ‘alâ Madhhab Al-Imâm Mâlik** was written by Imâm Muhammad Ibn Hârith Ibn Asad Al-Khushanî (d.361/972). He would frequently consider a word “Kull” (كُلُّ, all or every) as *Qâ'idah* or *Dâbit*.<sup>35</sup>
- b) **Anwâr AL-Borûq fî Anwâ' Al-Furûq**, is a splendid work including 548 *Qâ'idah* by Imâm Abû Al-'Abbâs Ahmad Ibn Abul-'Allâ' Idrîs Ibn 'Abdur-Rahmân who was called Al-Qarafîy (d.684/1285) from Egypt.<sup>36</sup>
- c) **Al-Qawâ'id** by Imâm Muhammad Ibn Muhammad Ibn Ahmad Al-Maqqariy (d.758/1357) from Maqqarâ (a town in Africa) and it includes 1200 *Qâ'idah*.<sup>37</sup>
- d) **Idâh Al-Masâlik elâ Qawâ'id Al-Imâm Malik** by Ahmad Ibn Yahiyâ Ibn Muhammad At-Tilmisaniy Al-Wanshrîsiy called Al-Wenshrisiy (d.914/1508). The book includes 118 *Qâ'idah* most of them serve his *Madhhab*.<sup>38</sup>
- e) **Al-Is'âf be at-Talab Mukhtasar Sharh Al-Manhaj Al-Muntakhab ‘alâ Qawâ'id Al-Madhhab**. The one who wrote the book **Al-Manhaj Al-Muntakhab ‘alâ Qawâ'id Al-Madhhab** was Abû Al-Hasan 'Alî Ibn Al-Qasîm az-Zaqâq Al-Fasiy (d.912/1506); yet the one who wrote the book

<sup>35</sup> Muhammad Ibn Hârith Ibn Asad **Al-Khushanî**, “Usûl Al-Futyâ fî Al-Fiqh ‘alâ Madhhab Al-Imâm Mâlik,” p.31, in **Al-Qawâ'id Al-Fiqhiyyah**, ed. by Dr. **An-Nadawî**, p. 190.

<sup>36</sup> Dr. **Bakr Ismâ'îl**, **Al-Qawâ'id Al-Fiqhiyyah**, pp. 22-23.

<sup>37</sup> The previous source, p. 23.

<sup>38</sup> The previous source, p. 24.

Al-Is'âf be at-Talab (Al-Mukhtasar) was Abû Al-Qasîm Ibn Muhammad Ibn At-Tawanî, a contemporary Malikiy scholar.<sup>39</sup>

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<sup>39</sup> Muhammad ibn Muhammad **Makhlûf** “Shajarat-un-Nûr az-Zakiyyah fî Tabaqât Al-Mâlikkiyyah,” p.274 in Al-Qawâ'id Al-Fiqhiyyah, ed. by Dr. **An-Nadawî**, p. 208.

- a) **Qawâ'id Al-Ahkâm fî Masâlih Al-Anâm** by Imâm 'Izz-ud-Dîn Ibn 'Abd-us-Salâm (d.660/1262)<sup>40</sup>
- b) **Al-Ashbâh Wan-Nazâ'ir** by Muhammad Ibn 'Umar Ibn Makkiy called Ibn Al-Wakîl Ash-Shâfi'iy (d.716/1316), but it was recorded by his brother's son, Zain-ud-Dîn (d.838/1434).<sup>41</sup>
- c) **Al-Majmû' Al-Madhhab fî Qawâ'id Al-Madhhab** by Imâm Khalîl Kikildî known as Abû Sa'id Al-'Alâi' (d.761/1360), and he explained the fifth *Qawâ'id Kulliyyah Kubrâ* and did not go beyond more than other 20 *Qâ'idah*.<sup>42</sup>
- d) **Al-Ashbâh Wan-Nazâ'ir** by Imâm 'Abdul-Wahâb Ibn 'Alî Ibn 'Abdul-Kâfi Ibn 'Alî Ibn Tamâm As-Subkkiy called Tâj-ud-Dîn (d.771/1369)<sup>43</sup>
- e) **Al-Manthûr fî Tartîb Al-Qawâ'id Al-Fiqhiyyah** or **Al-Qawâ'id fî Al-Furû'** by Imâm Muhammad Ibn Bahâder Ibn 'Abdullâh known as Badrud-Dîn Az-Zarkkashiy (d.745/1344).<sup>44</sup> This book includes 100 Qâ'idah.
- f) **Al-Ashbâh Wan-Nazâ'ir** by Imâm 'Umar Ibn 'Alî Ibn Ahmad Al-Ansâriy, called Ibn Al-Mulaqqen (d.804/1401).<sup>45</sup>

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40 **Ibn Al-'Imâd**, *Shazarât-udh-Dhahab*, Vol. 7, p. 522.

41 'Abd-ul-Wahhâb Ibn 'Alî Ibn 'Abd-ul-Kâfi **As-Subkkiy**, "Tabaqât ash-Shafi'iyyah Al-Kubrâ," Vol. 9, pp. 255-253, in *Al-Qawâ'id Al-Fiqhiyyah*, ed. by Dr. **An-Nadawî**, p. 215.

42 **Ibn Al-'Imâd**, *Shazarât-udh-Dhahab*, Vol. 9, pp. 28-29.

43 The previous source, Vol. 8, p. 378.

44 The previous source, Vol. 8, p. 572.

45 The previous source, Vol. 9, p. 71.



g) **Al-Ashbâh Wan-Nazâ'ir** by Imâm 'Abdur-Rahmân Ibn Abû Bakr Ibn Muhammad As-Seyûtî, called Jalâl-ud-Dîn but known as As-Seyûtî (d.911/1505).<sup>46</sup>

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<sup>46</sup> The previous source, Vol. 10, pp. 75.

- a) **Al-Qawâ'id An-Nurâniyyah Al-Fiqhiyyah** by Imâm Ahmad Ibn 'Abdul-Halîm Ibn 'Abdus-Salâm Ibn 'Abdullâh Ibn Tiymiyyah.<sup>47</sup>
- b) **Al-Qawâ'id Al-Fiqhiyyah** by Ahmad Ibn Al-Hasan Ibn 'Abdullâh called Sharaf-ud-Dîn, and known as Ibn Qâdî Al-Jabal (d.871/1467). Most of the *Qawâ'id* of this book support the *Madhhab*.<sup>48</sup>
- c) **Taqrîr Al-Qawâ'id wa Tahrîr Al-Fawâ'id** by Imâm 'Abdur-Rahmân Ibn Shihâb Ibn Ahmad Ibn Abû Ahmad Rajab called Ibn Rajab Al-Hanbaliy (d.795/1393). He constructed his researches on 260 *Qâ'idah*.<sup>49</sup>
- d) **(Khatimah) Mughnî Dhuw-ul-afhâm 'an Al-Kutob Al-Kathîrah fî Al-Ahkâm** by Yusuf Ibn Hasan Ibn Ahmad Ibn 'Abdul-Hâdî was surnamed by Jamâl-ud-Dîn, and called 'Abdul-Hâdî (d.909/1503)<sup>50</sup>
- e) **Qawâ'id Majalat al-Ahkâm Ash-Shar'iyyah 'alâ Madhhab Al-Imâm Ahmad Ibn Hanbal** by Ahmad Ibn 'Abdullâh Ibn Sheikh Muhammad Bashîr Al-Qârî (d.1359/1940).<sup>51</sup>

<sup>47</sup> **Ibn Al-'Imâd**, Shazarât-udh-Dhahab, Vol. 8, pp. 142.

<sup>48</sup> The previous source, Vol. 8, pp. 376.

<sup>49</sup> The previous source, Vol. 8, pp. 396.

<sup>50</sup> The previous source, Vol. 10, p. 62.

<sup>51</sup> The researchers' preface of the book "Qawâ'id Majalat-ul-Ahkâm Ash-Shar'iyyah 'alâ Madhhab Al-Imâm Ahmad Ibn Hanbal," pp.64-67, in Al-Qawâ'id Al-Fiqhiyyah, ed. by Dr. **An-Nadawî**, p. 262.

## Chapter 2

مَصَادِرُ وَ مُهِمَّةٌ وَ مَكَانَةُ الْقَوَائِدِ الْفِقْهِيَّةِ

**The Sources, Mission and Position of *Al-Qâ'idah Al-Fiqhiyyah* in  
issuing *Fatwa***

## مَصَادِرُ الْقَوَائِدِ الْفِقْهِيَّةِ

### Sources of *Al-Qawâ'id Al-Fiqhiyyah*

#### 1. The Quran and the Sunnah text (النص):

- Âyah (آية, verse) or Hadîth that has been taken as a *Qâ'idah Fiqhiyyah* or,
- Âyah or Hadîth that includes general *ruling* from which the jurists obtained a *Qâ'idah Fiqhiyyah* or more.

#### Examples for (a):

##### *From the Quran:*

Allâh (تعالى) says in the Noble Qur'ân:

(...وَأَحَلَّ اللَّهُ الْبَيْعَ وَحَرَّمَ الرِّبَا...)

(.....and Allâh has permitted trading and forbidden *Ribâ* (ربًا, usury))<sup>52</sup>  
(Sûrah 2. Al-Baqarah, Âyah 275)

This Âyah permits lawful trading and forbids usury.

##### *From the Sunnah:*

حَدَّثَنِي إِسْحَاقُ حَدَّثَنَا خَالِدٌ عَنْ الشَّيْبَانِيِّ عَنْ سَعِيدِ بْنِ أَبِي بُرْدَةَ عَنْ أَبِيهِ عَنْ أَبِي مُوسَى الْأَشْعَرِيِّ رَضِيَ اللَّهُ عَنْهُ: أَنَّ النَّبِيَّ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ بَعَثَهُ إِلَى الْيَمَنِ فَسَأَلَهُ عَنْ أَشْرَبَةِ تَصْنَعُ بِهَا فَقَالَ: (وَمَا هِيَ) . قَالَ الْبَنْعُ وَالْمِزْرُ فَقُلْتُ لِأَبِي بُرْدَةَ مَا الْبَنْعُ؟ قَالَ نَبِيدُ الْعَسَلِ وَالْمِزْرُ نَبِيدُ الشَّعِيرِ فَقَالَ: (كُلُّ مُسْكِرٍ حَرَامٌ).

<sup>52</sup> Usury, which is of two major kinds: (a) *Ribâ an-Nasî'ah*, i.e. interest on lent money; (b) *Ribâ al-Fadl*, i.e. taking a superior thing of the same kind of goods by giving more of the same kind of goods of inferior quality, e.g., dates of superior quality of dates of inferior quality in greater amount. Islam strictly forbids all kinds of usury.

Narrated Is-hâq that Khâlid that Ash-Shiybânî that the father of Sa'îd ibn Burdah that Abû Mûsâ Al-Ash'arî رضي الله عنه: Allâh's Messenger صلى الله عليه وسلم said,:  
“*Kull musker harâm* [Every musker (مُسْكِرُ, whatever intoxicates or causes drunkenness) is *Harâm* (حَرَامُ, unlawful)]<sup>53</sup>.”

### **An Example for (b):**

*The maxim, Qâ'idah,:*

”الْأُمُورُ بِمَقَاصِدِهَا ”

**(Al-umûr be maqâsidehâ) Acts are judged by the intention behind them or take the will for the deed,”**

Is extracted from a number of texts from the Qur'ân and the Sunnah.

## **2. The Analogy *Qiyâs* (قياس):**

*The maxim, Qâ'idah, :*

”الْمَجْهُولُ كَالْمَعْدُومِ ”

**(Al-majhûl kal-ma'dûm) An unknown object is similar to a nonexistent one,”**

if an unknown object was compared against a nonexistent object, both of them take the same judgment since neither can be obtained.

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<sup>53</sup> Sahîh Al-Bukhârî, chapter: Rulers assigned in one place should cooperate with one another, 4087; and Sahîh Muslim, 5332.

### 3. The Indication *Dalâlah* (دلالة):

*Istidlâl* (استدلال) literally means asking for evidence or proof<sup>54</sup>; however, it practically (in this field) means giving evidence or proof which does not directly extracted from a text (from the Qur'ân or Sunnah), *Ijmâ'* (إجماع, consensus) or *Qiyâs*.

An example of that is a maxim, *Qâ'idah* says:

”الأصلُ بَرَاءَةُ الذِّمَّةِ”

**(*Al-asl barâ'tudh-dhimmah*) Non-liability or man is absolved from guilt, blame or responsibility for any wrong deed in principle,”.**

### 4. The Favouring *Tarjîh* (ترجيح):

When evidence hinders one another, one of them tends to take priority over the other, in the eyes of the *Faqîh* (فقيه, a jurist).<sup>55</sup>

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<sup>54</sup> ‘Alî Ibn Muhammad Ibn ‘Alî **Aj-Jerjânî**, *At-Ta‘rifât*, p. 193. Beirut, Lebanon: Dâr Al-Kitâb Al-‘arabiy Press, 1<sup>st</sup>. ed., 1405/1985.

<sup>55</sup> A learned man who can give religious verdicts.

## Mission of *Al-Qawâ'id Al-Fiqhiyyah*

“Familiarity with the *Qawâ'id Fiqhiyyah* may save a person from committing the branches (*Furû'*) and particles (*Juz'iyât*) to his memory,” Imâm Al-Qarâfiy said.<sup>56</sup> Imâm Az-Zarkkashiy, in addition, stated that *Al-Qawâ'id Al-Fiqhiyyah* are the way to preserve the *Fiqh* and assemble its different parts.<sup>57</sup> Imâm As-Seyûtî stated that *Al-Qawâ'id Al-Fiqhiyyah* enable a jurist to answer dissimilar *Nawâzel* (نَوَازِل, new questions related to recent events).<sup>58</sup>

The mission of *Al-Qawâ'id Al-Fiqhiyyah* can be stated as follows:

- i. To Simplify and to assemble the branches (*Furû'*) of Islamic *Fiqh*.
- ii. To extract and organize different branches of rulings (*Ahkam*) under one topic in order to avoid contradictions.
- iii. To assist scholars to infer replies to *Nawâzel*.
- iv. To allow scholars to compare between various *Madhâhib*.
- v. To prove that Islamic *Fiqh* encompasses any community, everywhere anytime and everytime.

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<sup>56</sup> Al-Qarâfiy, *Anwâr AL-Borûq*, Vol. 1, p. 7.

<sup>57</sup> Ahmad Ibn ‘Abdullâh Ibn Hamîd, the researcher (in his preface) of the book *Al-Qawâ'id*, ed. by Muhammad Ibn Muhammad Ibn Ahmad Al-Maqqariy, Vol. 1, p.114. Saudi Arabia: Omm Al-Qurâ University, Islamic Researches Institute, printed no. 4000250.

<sup>58</sup> As-Seyûtî, *Al-Ashbâh Wan-Nazâ'ir*, p.326 .

مَكَانَةُ الْقَوَائِدِ الْفِقْهِيَّةِ فِي إِصْدَارِ الْفَتْوَى وَالْأَحْكَامِ  
هل يجوز جعل القاعدة الفقهية دليلاً يستنبط منه الحكم؟  
وما مدى اعتمادها في الإفتاء والقضاء؟

The Position of *Al-Qawâ'id Al-Fiqhiyyah* in Issuing *Fatwa* and *Ahkâm*  
Is it permissible to consider *Al-Qawâ'id Al-Fiqhiyyah* as one of the  
*Adellah Shar'iyah*?<sup>59</sup>

Can *Al-Qawâ'id Al-Fiqhiyyah* be among the proofs that infer *Ahkâm*  
(أحكام, Judgments)?

*Al-Qawâ'id Al-Fiqhiyyah* have been the focus of scholars' attention, and their *Fatwa* (فَتْوَى, legal opinions of Islamic Law) continuously until our present time. "Numerous *Qawâ'id Fiqhiyyah* included in the books of Imâms (who give *Fatwa*) and the magistrates are not in the books of *Usûl Al-Fiqh*," Imâm Al-Qarâfiy stated.<sup>60</sup>

**Is it permissible to consider *Al-Qawâ'id Al-Fiqhiyyah* as one of the evidences (*Adellah Shar'iyah*) for judgments (أحكام)?**

Sheikh Mustafâ Az-Zurqqâ stated that *Al-Qawâ'id Al-Fiqhiyyah* handle *Fiqh* and have many exceptions, but they are not *Nusûs* (نُصُوص, texts from the Qur'ân or Sunnah) used for judgments.<sup>61</sup>

<sup>59</sup> Shâri'ah's sources i.e. Qur'ân, Sunnah and *Ijmâ'*—there are other sources but there is no consensus on them.

<sup>60</sup> Al-Qarâfiy, *Anwâr AL-Borûq*, vol. 2, p.110.

<sup>61</sup> Dr. Mustafâ Ahmad Az-Zurqqâ, *Al-Madkhal Al-Fiqhiy Al-'Âmm*, Vol. 2, pp.966-967, chapter 79, passage 4. Damascus: Dâr-Al-Qalam Press, 1418/1998.



A jurist can issue a Fatwa or a judgment based on a *Qâ'idah Fiqhiyyah*, since *Al-Qawâ'id Al-Fiqhiyyah* are definitely based on direct/indirect evidence coming from the Qur'ân or/and Sunnah.<sup>62</sup>

- **If the maxim (*Al-Qâ'idah*) was an exact text (النص) from the Qur'ân or the Sunnah** ---- the maxim (*Al-Qâ'idah*) can be used as a proof for a judgment or (حكم)
- **If the maxim (*Al-Qâ'idah*) was derived from “fully agreed on” proofs, the Qur'ân, the Sunnah, or consensus (إجماع)** ---- the proof of the maxim (*Al-Qâ'idah*) can be used as a proof for a judgment or (حكم)
- **If the maxim (*Al-Qâ'idah*) was derived from “not fully agreed on” proofs, (قياس *Qiyâs*, استصحاب *Istis-hâb*<sup>63</sup>, مصلحة *Maslahah*<sup>64</sup> or عُرف *'Urf*<sup>65</sup>, etc.)** ---- the proof of the maxim (*Al-Qâ'idah*) can be used as a secondary proof for a judgment or (حكم)
- **If the maxim (*Al-Qâ'idah*) was derived by ways of Ijtihad**, ---- the proof of the maxim (*Al-Qâ'idah*) can be used as a proof for a judgment or (حكم).<sup>66</sup>

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<sup>62</sup> Dr. **Ar-Rokkî**, *Nazariyat-ut-Taq'îd Al-Fiqhiy*, pp. 36-38.

<sup>63</sup> The first state of a specific case or matter.

<sup>64</sup> An unspecified public interest.

<sup>65</sup> Tradition, custom, institution, and so on.

<sup>66</sup> Dr. **An-Nadawî**, *Al-Qawâ'id Al-Fiqhiyyah*, p.331.

## Part II.

القَوَائِدُ الْفِقْهِيَّةُ وَالْمُصْطَلَحَاتُ الْمُتَعَلِّقَةُ بِهَا

**Al-Qawâ'id Al-Fiqhiyyah (Legal Maxims of Islamic  
Jurisprudence) and Related Vocabulary**

## الْفَرْقُ بَيْنَ الْفَاعِلَةِ الْفَقْهِيَّةِ وَالضَّابِّ الْفَقْهِي

### (*Al-Qâ'idah Al-Fiqhiyyah* and *Ad-Dâbit Al-Fiqhiy*)

## Differences between the Legal Maxim of Islamic Jurisprudence and the Controller of Islamic Jurisprudence

*Ad-Dâbit* (الضَّابُّ) literally means a block, which prevents things or matters from coming through or a controller that preserves and control strictly.<sup>67</sup>

In the context of Islamic law, *Ad-Dâbit* (الضَّابُّ) is defined as the total rule which controls a set of branches (*Fûrû'* (فُرُوع)) that belong to one chapter of *Fiqh*.<sup>68</sup>

Scholars have differentiated between *Al-Qâ'idah Al-Fiqhiyyah* and *Ad-Dâbit Al-Fiqhiy* (ضَّابُّ فِقْهِي, a controller of *Fiqh*) as follows:

1. Imâm Ibn Nujaim<sup>69</sup> said, "The difference between *Ad-Dâbit* and *Al-Qâ'idah* is that *Al-Qâ'idah Al-Fiqhiyyah* has embraced *Fûrû'* from several chapters of *Fiqh*, whereas *Ad-Dâbit* has included *Furû'* from one chapter of *Fiqh*."<sup>70</sup>

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<sup>67</sup> Muhammad Ibn Ya'qûb **Al-Fairozabadî**, *Al-Qâmûs Al-Muhîd*, p.911. Beirut, Lebanon: Dâr Ihyâ Al-Turâth Al-'Arabiy, 2<sup>nd</sup>. ed., 1420/2000.

<sup>68</sup> Dr. Musfir Ibn 'Alî Ibn Muhammad **Al-Qahtâniy**, *Manhaj Istinbât Ahkâm An-Nawâzil Al-Fiqhiyyah Al-Mu'ahsirah*, p.448. Saudi Arabia: Omm Al-Qurâ University, printed no. 30102000003768.

<sup>69</sup> Zain-ud-Dîn Ibn Ibrâhîm Ibn Muhammad among the greatest scholars of Hanafiy Madhhab (d.970/1562) and have written several books such as *Al-Ashbâh wan-Nazâ'ir*, *Al-Bahr ar-Râ'iq fî Sharh Kanz Ad-Daqâ'iq*, *Ar-Rasâ'il az-Zeiniyyah*, etc. See *Al-A'lâm* by **Az-Zarkkalî**, Vol. 3, p. 64.

<sup>70</sup> Muhammad 'Amîm-ul-Ihsân Al-Baraktî **Al-Mujaddadiy**, *Qawâ'id Al-Fiqh*, p. 50. Karachi: As-Sudf Publishers Press, 1407/1986.

2. Imâm as-Seyûtî<sup>71</sup> said, “*Al-Qâ'idah Al-Fiqhiyyah* includes *Fûrû'* from several chapters of *Fiqh*, whereas *Ad-Dâbit Al-Fiqhiy* contains *Fûrû'* from one chapter.”<sup>72</sup>
3. Perhaps the two previous definitions were taken from that of Imâm As-Subkkiy who said, “Most likely, *Ad-Dâbit Al-Fiqhiy* is appointed to organize similar cases of one chapter of *Fiqh*.”<sup>73</sup>

Hence the main two distinctions between *Al-Qâ'idah Al-Fiqhiyyah* and *Ad-Dâbit Al-Fiqhiy* are:

1. *Al-Qâ'idah Al-Fiqhiyyah* is more general and comprehensive than *Ad-Dâbit Al-Fiqhiy* since the former includes several chapters of *Fiqh*, whereas the latter contains only one.
2. *Al-Qâ'idah Al-Fiqhiyyah* has more exceptions than *Ad-Dâbit Al-Fiqhiy* which controls one chapter of *Fiqh*, so there is not much room for exceptions.

Some scholars, on the other hand, did not differentiate between *Al-Qâ'idah Al-Fiqhiyyah* and *Ad-Dâbit Al-Fiqhiy*. An example of those is Imâm An-Nâbolsiy<sup>74</sup>.

Following are some examples that demonstrate the difference between *Al-Qâ'idah Al-Fiqhiyyah* and *Ad-Dâbit Al-Fiqhiy*.

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<sup>71</sup> ‘Abdur-Rahmân Ibn Abû Bakr Ibn Muhammad Ibn Sâbiq-ud-Dîn Al-Khudairî Jalâl-ud-Dîn among the greatest scholars and historians and he authored about 600 books. Born in Cairo (d.911/1505). See *Al-A'lâm* by **Az-Zarkkalî**, Vol. 3, p. 301.

<sup>72</sup> **As-Seyûtî**, *Al-Ashbâh Wan-Nazâ'ir*, p.47.

<sup>73</sup> ‘Abd-ul-Wahhâb Ibn ‘Alî Ibn ‘Abd-ul-Kâfî **As-Subkkiy**, *Al-Ashbâh Wan-Nazâ'ir*, p. 21. Beirut, Lebanon: Dâr Al-Kutub Al-‘Ilmîyyah Press, Volume 2, 1<sup>st</sup>. ed., 1411/1991.

<sup>74</sup> ‘Abdul-Ghanî Ibn Ismâ‘îl Ibn ‘Abdul-Ghanî, a great scholar of religion and literature born in Damascus (d.1143/1731). See *Al-A'lâm* by **Az-Zarkkalî**, Vol. 4, p. 32.

### **Ad-Dâbit Al-Fiqhiy from the Sunnah:**

Each of the following Hadîth represents *Dâbit Fiqhiy* in its subject and covers a specific chapter:

حَدَّثَنَا قُتَيْبَةُ وَحَدَّثَنَا سُفْيَانُ بْنُ عُيَيْنَةَ وَ عَبْدِ الْعَزِيزِ بْنِ مُحَمَّدٍ عَنْ زَيْدِ بْنِ أَسْلَمَ عَنْ عَبْدِ الرَّحْمَنِ بْنِ وَعْلَةَ عَنْ ابْنِ عَبَّاسٍ قَالَ: قَالَ رَسُولُ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ: ( أَيُّمَا إِهَابٍ دُبِغَ فَقَدْ طَهِّرَ ).

Narrated Qutiybah, Sufyân ibn ‘Uyaynâh and ‘Abdul-‘Azîz ibn Muhammad that Ziyd ibn Aslam that ‘Abdur-Rahmân ibn Wa‘lah that Ibn ‘Abbâs رضى الله عنهما: Allâh's Messenger صلى الله عليه وسلم said, “Whichever animal skins be tanned, they grow *Tâhir* (طَاهِرُ, pure or clean).”<sup>75</sup>

The above Hadîth stands for *Dâbit Fiqhiy* in its subject (طَهَارَةٌ, *Tahârah* or purification) and covers an specific chapter of *Tahârah*.<sup>76</sup>

حَدَّثَنَا سُلَيْمَانُ بْنُ حَرْبٍ حَدَّثَنَا شُعْبَةُ عَنْ قَتَادَةَ عَنْ صَالِحِ أَبِي الْخَلِيلِ عَنْ عَبْدِ اللَّهِ بْنِ الْحَارِثِ رَفَعَهُ إِلَى حَكِيمِ بْنِ حِزَامٍ رَضِيَ اللَّهُ عَنْهُ قَالَ: قَالَ رَسُولُ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ: ( الْبَيْعَانِ بِالْخِيَارِ مَا لَمْ يَتَفَرَّقَا أَوْ قَالَ حَتَّى يَتَفَرَّقَا فَإِنْ صَدَقَا وَبَيَّنَّا بُورِكَ لَهُمَا فِي بَيْعِهِمَا وَإِنْ كَتَمَا وَكَذَبَا مُحِقَتْ بَرَكَةُ بَيْعِهِمَا ).

Narrated Suleimân ibn Harb that Shu‘bah that Qatâdah that Salîh Abî Al-Khalîl that ‘Abdullâh ibn Al-Hârith that Hakîm Ibn Hizâm رضى الله عنه:

Allâh's Messenger صلى الله عليه وسلم said, “The seller and the buyer have the right to keep or return the goods as long as they have not parted or till they part. And if both the parties spoke the truth and described the defects and qualities (of

<sup>75</sup> It is *hasan* (good) hadîth, Al-Jâmi‘As-Sâhîh Sunan At-Tirmidhî, chapter: The dress, 1728, verified by Ahmad Shâker and others, and it is authenticated by Nâsir-du-Dîn Al-Albâniy. Beirut, Lebanon: Dâr Ihyâ’ At-Turâth Al-‘arabiy Press. Volume 5.

<sup>76</sup> Dr. Muhammad Bakr Ismâ‘îl, Al-Qawâ'id Al-Fiqhiyyah baiyn Al-Asâlah Wat-Tawjîh, p.8. Cairo, Egypt: Dâr Al-Manâr Press, 1<sup>st</sup>. ed., 1417/1997. Egypt: Dâr Al-Manâr Press, 1<sup>st</sup>. ed., 1417/1997.

the goods), then they would be blessed in their transaction, and if they told lies or hid something, then the blessings of their transaction would be lost.”<sup>77</sup> Similarly, the above Hadîth represents a *Dâbit Fiqhiy* in its subject (selling) and covers a specific chapter of selling and trading.

**Ad-Dâbit Al-Fiqhiy from the sayings of the *Fuqahâ'* (فُقَهَاءُ, jurists):**

- It was narrated that *Mujâhid* (a disciple of Ibn ‘Abbâs (d.104/722))<sup>78</sup> said, “There should be ‘*Ushr* (a 10% levy) upon whatever is produced from the ground, more or less, whether the soil be watered by the overflow of rivers or by periodical rains.”<sup>79</sup>
- It is known in Malikiy Madhhab's books more than others that there is a *Dâbit Fiqhiy* that specifies: “Water is *Tâhir* (pure or clean), as long as its color, smell or taste does not change because of a substance which cannot be separated.”

It is noteworthy to mention that the terminologies of *Al-Qâ'idah Al-Fiqhiyyah* and *Ad-Dâbit Al-Fiqhiy* were not distinguished by scholars except in later centuries.

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<sup>77</sup> Summarized Sahîh Al-Bukharî Arabic-English, chapter: Bargains, 996. by Dr. **Khân**, Muhammad Muhsin. Riyadh, Saudi Arabia: Dar-us-Salâm Press, 1415/1994.

<sup>78</sup> **Mujâhid** Ibn Jâbir Abû Al-Hajjâj Al-Makkiy, one of the greatest Imâms of Explanation of the Qur’ân, see Sayar A‘lâm An-Nubalâ’, Muhammad Ibn Ahmad Ibn ‘Uthmân **Adh-Dhahabî**, Vol. 4, p. 449. Verified by Shu‘iyb Al-Arna’ût. Beirut, Lebanon: Ar-Risâlah Foundation Press, 1413/1993.

<sup>79</sup> Al-Qâsim Ibn Salâm, “Kitâb Al-Amwâl”, p. 674 in Al-Qawâ'id Al-Fiqhiyyah by Dr. **An-Nadawî**, p. 49. Zakâh means a certain fixed proportion of the wealth (2 ½ %) of every Muslim to be paid yearly for the benefit of the poor in the Muslim community. The payment of Zakâh is obligatory as it is one of the five pillars of Islam. Zakâh is the major economic means for establishing social justice and leading the Muslim society to prosperity and security.

## الْفَرْقُ بَيْنَ الْقَاعِدَةِ الْفِقْهِيَّةِ وَالنَّظَرِيَّةِ الْفِقْهِيَّةِ

### **(Al-Qâ'idah Al-Fiqhiyyah and An-Nazariyyah Al-Fiqhiyyah)** **Differences between the legal maxim of Islamic law and the theory of Islamic law**

*An-Nazariyyah* (النَّظَرِيَّةُ) **literally means** the theory, and it practically means:

***The set of conceptions that are connected together, to prove the logical relationship between a set of premises and their outcomes.***

Following are two opinions of Scholars concerning *An-Nazariyyah Al-Fiqhiyyah* (النَّظَرِيَّةُ الْفِقْهِيَّةُ)

#### **The First one:**

- "It is the large constitutions and conceptions forming a legal subjective system spreading in Islamic *Fiqh*. The elements of that system control sorts of judgments relating to the subject of that system such as the Notion of Ownership (and its reasons), the Notion of Contract (and the rules and results of the contract), the Notion of the Legal Capacity (and its opposites), and so on," Sheikh Mustafâ Az-Zurqâ stated.<sup>80</sup>
- "It is a group of similar judgments combined by one analogy or one controller such as the Rules of Ownership (in *Sharî'ah*) and the Rules of Guarantee. It is the fruit of the separated parts of Islamic *Fiqh* that a jurist ties them by *Qâ'idah* (governs these separated parts) or by *Nazariyyah* (combine them)," Sheikh Muhammad Abu Zahrah stated.<sup>81</sup>

#### **The Second one:**

The theory or *An-Nazariyyah* (النَّظَرِيَّةُ) term does not come from our *Sharî'ah* and it does not represent a meaningful description as do the acceptable

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<sup>80</sup> Az-Zurqqâ, *Al-Madkhal*, Vol. 1, p.253

<sup>81</sup> Muhammad Ahmad Mustafâ Ahmad Abû Zahrah, *Usûl Al-Fiqh*, p. 10, Dâr AL-I-Fikr AL-'Arabiyy, 1377/1958.

Islamic terms and vocabulary. “For example, we, Muslims, do not know ownership through research or study rather through Islam: Allah, glory be to Him, has granted His slaves the right of ownership and descended bases of such in His Book and through His Messenger’s tongue ﷺ ; the nearest proof of that is this *Āyah*:

( هُوَ الَّذِي خَلَقَ لَكُمْ مَا فِي الْأَرْضِ جَمِيعاً ... )

(He it is Who created for you all that is on earth...)

(Sûrah 2. Al-Baqrah, *Āyah* 29)

In fact, *Al-‘Urf* (العُرْفُ, Tradition) is an Islamic secondary proof, in the eyes of *Usûliyyîn* (الأصوليون, Scholars trust texts) and Jurists, and is proved true as *Hujjah* (حُجَّةٌ, a reliable proof) by many *Adellah Shar’iyyah* (الأدلة الشرعية). So, why people should say,

- *Nazariyyah Al-‘Urf* (نَظَرِيَّةُ العُرْفِ, Theory of tradition) instead of *Dalîl Al-‘Urf* (دَلِيلُ العُرْفِ, Proof comes from tradition),
- *Haqq Al-‘Aqd* (حَقُّ العَقْدِ, Right of making a contract) instead of not *Nazariyyah Al-‘Aqd* (نَظَرِيَّةُ العَقْدِ, Theory of making a contract),
- *Wâjib Al-Iltizâm* (وَاجِبُ الإلتِزَامِ, Duty of fulfillment) instead of *Nazariyyah Al-Iltizâm* (نَظَرِيَّةُ الإلتِزَامِ, Theory of fulfillment) and so on.”<sup>82</sup>

Therefore, *Al-Qâ‘idah Al-Fiqhiyyah* might be deemed *Dâbit* (controller) of Fiqh for *An-Nazariyyah Al-Fiqhiyyah*.

For instance, *Qâ‘idah Fiqhiyyah* saying:

”الْعِبْرَةُ فِي الْعُقُودِ بِالْمَقَاصِدِ وَالْمَعَانِي لَا بِالْأَلْفَاظِ وَالْمَبَانِي”

<sup>82</sup> Dr. Al-Bornû, *Al-Wajîz*, pp.91-93.



**(Al-'ibrah fī al-'uqūd be al-maqasid wa al-ma'ânî lâ be al-alfâz wa al-mabânî)** The crucial point in contracts is their goals and meanings not their words or forms," is simply *Dâbit Fiqhiy* in a particular aspect of *Nazariyyah al-'Aqd* and so on. The *Nazariyyah Fiqhiyyah*, thus, may embrace *Al-Qawâ'id Al-Fiqhiyyah*, and *an-Nazariyyah* may be preponderant *Qâ'idah* including many *Nazariyyât* (نَظَرِيَّاتُ, plural of *Nazariyyah*) associated by one tie such as *Nazariyyah ad-Darûrah* (نَظَرِيَّةُ الضَّرُورَةِ, Theory of necessity) and *Nazariyyah al-'Urf* (Theory of tradition) which encompass many *Qawâ'id*.<sup>83</sup> It is important to note that there are scholars who never separate *Al-Qâ'idah Al-Fiqhiyyah* from *an-Nazariyyah Al-Fiqhiyyah*.

### In conclusion:

*Al-Qâ'idah Al-Fiqhiyyah* are different from *an-Nazariyyah Al-Fiqhiyyah* in:

- i. It is a *Shr'iy* (شَرْعِي, Islamic) *Hukm*/matter/case while *an-Nazariyyah Al-Fiqhiyyah* is a study that assembles subjects and *Ahkâm* of Islamic *Fiqh*.
- ii. To establish *Al-Qâ'idah Al-Fiqhiyyah*, it needs one of Islamic sources (i.e. the *Qur'ân*, *Sunnah* or *Ijmâ'*); however, *an-Nazariyyah Al-Fiqhiyyah* could only need the study of written works of Islamic *Fiqh*.
- iii. *An-Nazariyyah* is a matter that is logically authenticated by proofs but *Al-Qâ'idah* is established by proofs or *Adellah Shar'iyyah*.
- iv. Scholars have inferred *Al-Qawâ'id* from texts of the *Qur'ân*, *Sunnah* and/or goals of *Sharî'ah* for establishing *Ahkâm* for clear questions and cases. *An-Nazariyyah*, however, has been contingent on the soul's and intellect's views, which are subjected to true/false.
- v. *Al-Qâ'idah Al-Fiqhiyyah* contains, in itself, *Hukm*, which judges all branches of such a *Qâ'idah*. For example the *Qâ'idah* :

”الْيَقِينُ لَا يَزُولُ بِالشَّكِّ”

<sup>83</sup> The previous source, pp. 11-12.

**(Al-yaqîn lâ yazûl be ash-shakk) (Certainty is not overruled by doubt,**", holds a *Hukm* in every case including certainty and doubt. Such is contrary to *an-Nazariyyah Al-Fiqhiyyah* which does not hold *Hukm* in itself like *Nazariyyah Al-Melkiyyah* (نَظَرِيَّةُ الْمَلَكِيَّةِ, Theory of ownership) and so on.

- vi. *An-Nazariyyah Al-Fiqhiyyah* includes pillars and conditions contrary to *Al-Qâ'idah Al-Fiqhiyyah*.

## الْفَرْقُ بَيْنَ الْقَاعِدَةِ الْفَقْهِيَّةِ وَالْقَاعِدَةِ الْأُصُولِيَّةِ

### **(Al-Qâ'idah Al-Fiqhiyyah and Al-Qâ'idah Al-Usuliyyah) The Differences between the legal maxim of Islamic law and the legal maxim, which belongs to methodology in Islamic jurisprudence**

Perhaps, the first one who made a distinction between *Al-Qâ'idah Al-Fiqhiyyah* and *Al-Qâ'idah Al-Usuliyyah* (methodology in Islamic Law) was Imâm Al-Qarâfiy<sup>84</sup> who said, "The great Sharî'ah has included *Usûl* (أُصُولُ plural of *Asl*: origin) and *Furû'* of Islamic Law. Besides, *Usûl* of Sharî'ah are divided into two parts. The first part is called *Usûl Al-Fiqh* (أُصُولُ الْفِقْهِ methodology in Islamic Law) and most of it are *Qawâ'id* eliciting rules from Arabic words. These Arabic words usually encounter *An-Naskh* (النَّسْخُ, Abrogation) and *Tarjîh* (التَّرْجِيحُ, favouring) such as *Al-Amr* (الأَمْرُ, ordainment) that means obligation and *An-Nahy* (النَّهْيُ, prohibition) that means prevention, and so on. The second part is *Qawâ'id Fiqhiyyah Kulliyyah* (Normative legal maxims) that embraces secrets and the wisdom of the Sharî'ah; and each *Qâ'idah* contains countless branches of Islamic Law which are not mentioned in *Usûl Al-Fiqh*."<sup>85</sup>

Following are some of the differences between *Al-Qâ'idah Al-Fiqhiyyah* and *Al-Qâ'idah Al-Usuliyyah*:

1. *Al-Qâ'idah Al-Fiqhiyyah* is an all-inclusive or a preponderant case and its parts are some questions of *Fiqh*. Besides, its subject is always an action of a man, whereas *Usûl Al-Fiqh* are *Dâbit* (a controller) of *Fiqh* and a balance of correct deduction.
2. *Al-Qawâ'id Al-Usuliyyah* are all-encompassing and general, including all their parts and subjects; however, *Al-Qawâ'id Al-Fiqhiyyah* are

<sup>84</sup> Abû Al-'Abbâs Shihâb-ud-Dîn Ahmad Ibn Idrîs As-Sanhâjiy among the greatest scholars of Mâlikkiyyah born and died in Cairo (d.684/1285). See *Al-A'lâm* by **Az-Zarkkalî**, Vol. 1, pp. 94-95.

<sup>85</sup> **Al-Qarâfiy**, *Anwâr AL-Borûq*, Vol. 1, p. 7.

preponderant, including most their parts and they have some exceptions.

3. *Al-Qawâ'id Al-Fiqhiyyah*, deals with branches of Islamic Law, while *Al-Qawâ'id Usûliyyah* is independent of Islamic Law's branches, since an independent scholar must abide by them in order to infer one rule or more from sources of Sharî'ah.
4. *Al-Qâ'idah Al-Fiqhiyyah* and *Al-Qâ'idah Al-Usuliyyah* include *Juz'iiyyat*.
5. *Al-Qawâ'id Al-Fiqhiyyah* are the cases that *Ahkâm* of Fiqh fall under.

These *Ahkâm* of Fiqh are concluded by independent scholars based on the methodologies of *Usûl Al-Fiqh*. If a jurist considers them as partial *Ahkâm*, then they are not *Qawâ'id Fiqhiyyah*. If, however, they were considered as all-inclusive cases (under them partial *Ahkâm* fall), then they are *Qawâ'id Fiqhiyyah*.

## تَعْرِيفُ الْأَشْبَاهِ وَالنَّظَائِرِ

### (*Al-Ashbâh Wan-Nazâ'ir*)

#### Definition of the similar matters and the counterparts

“*Al-Ashbâh*” (الأشْبَاه) is the plural of “*Shebh*” (شَبْه) or “*Shabah*” (شَبَّه) which literally means similitude and resemblance.

Imam An-Nasafi<sup>86</sup> said, “If an incident or a case, has no solution or an answer, we resort to its *Shabah* (a similar) incident and case which already have a solution or an answer.”<sup>87</sup>

“*Al-Nazâ'ir*” (النَّظَائِرُ), on the other hand, is the plural of “*Al-Nazîr*” (النَّظِيرُ) which linguistically means an equal or a counterpart. Although linguists consider “*Al-Mathîl*” (المَثِيلُ, match), “*Ash-Shabîh*” (الشَّيْبِية, a similar one) and “*An-Nazîr*” (a counterpart) as having one meaning, jurists do not. They state the difference between the terms as follows:

“*Al-Mumâthalah*” (المُمَاثَلَةُ, exact equivalence) necessitates equality on all aspects of a particular matter.

“*Al-Mushâbahah*” (المُشَابَهَةُ, likeness) necessitates sharing in most aspects.

“*Al-Munâzarah*” (المُنَازَرَةُ, not exact equivalence) necessitates sharing at least one aspect of a specific matter.

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<sup>86</sup> Nejm-ud-Dîn ‘Umar Ibn Muhammad Ibn Ahmad Ibn Ismâ‘îl Abû Hafs As-Samarqandiy **An-Nasafi** (d.537/1142). See *Al-A‘lâm* by **Az-Zarkkalî**, Vol. 5, pp. 60-61.

<sup>87</sup> Nejm-ud-Dîn ‘Umar Ibn Muhammad Ibn Ahmad Ibn Ismâ‘îl Abû Hafs As-Samarqandiy **An-Nasafi**, *Talabât At-Talabah fî Istilahât Al-Fuqahâ* p. 130. Verified by Khâlid ‘Abdur-Rahmân. Beirut, Lebanon: Dâr an-Nafâ’is Press, 1<sup>st</sup>. ed. 1416/1995.

Numerous books were written under the title *Al-Ashbâh Wan-Nazâ'ir*.

Following are some examples of these books:

- i. Imâm Muqâtil Ibn Suleimân Al-Balkhî (d.150/767), wrote **Al-Ashbâh Wan-Nazâ'ir fî Tafsêr Al-Qur'ân Al-'Azîm** in the first century A.H.
- ii. Al-Khâlid Ibn Abû Bakr (d.380/990) and Abû 'Uthmân Sa'îd (d.390/1000) wrote **Al-Ashbâh Wan-Nazâ'ir men Ash'âr Al-Mutaqademîn wa Al-Jahiliyyah wa Al-Mukhadramîn**.
- iii. Imam As-Seyûtî wrote **Al-Ashbâh wan-Nazâ'ir fî An-Nahw**.
- iv. At the beginning of the eighth century A.H., jurists wrote in *Al-Qawâ'id Al-Fiqhiyyah* such as Ibn Al-Wakîl<sup>88</sup> and Ibn Nujaim Al-Hanafiyy.
- v. Some examples in the science of *Al-Qawâ'id Al-Fiqhiyyah*, were written by Imam Jalâlud-Dîn As-Seyûtî in his book **Al-Ashbâh Wan-Nazâ'ir fî Qawâ'id wa Furû' Fiqh Ash-Shafî'iyyah**.

The studying of *Al-Ashbâh Wan-Nazâ'ir* helps scholars develop the ability to distinguish the exact meaning of words that could have the same meaning if they were used alone in one context, and different meanings when they are used in the same paragraph or context. Following are some examples of that:

A. *Faqîr* (فَقِيرٌ, the poor person who does not beg) and *Miskîn* (مِسْكِينٌ, the poor person who begs),<sup>89</sup>

B. *Kafîr* (كَافِرٌ, disbeliever) and *Mushrik* (مُشْرِكٌ, polytheist),

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<sup>88</sup> Abû 'Abdullâh Muhammad Ibn 'Abdullâh Ibn 'Umar Ibn Makkî ash-Shaf'iy born and died in Egypt called Ibn Al-Murhal, a great Faqîh and Poet (d.716/1316). See Al-A'lâm by **Az-Zarkkalî**, Vol. 6, p. 314.

<sup>89</sup> Imâm Mâlik said this explanation, in the book of ibn Sahnûn; this is the fourth opinion out of nine opinions. See Al-Jâmi' le Ahkâm Al-Qur'ân by Abû 'Abdullâh Muhammad ibn Ahmad Al-Ansâriy **Al-Qurtubiy** (d.671/1273). Cairo: Dâr Ash-Sha'b, Volume 8.

- C. *Imân* (إِيمَانُ, Faith and trust in Allâh ) and Islâm
- D. *Mutlaq Al-Mâ'* (مُطْلَقُ الْمَاءِ) is not similar to *Al-Mâ' Al-Mutlaq* (الْمَاءُ الْمُطْلَقُ).  
The former means water in general (pure/impure), but the latter means specific water (pure water).
- E. Opinions, in *Usûl Al-Fiqh*, are varied in the meaning of *An-Naskh* (النَّسْخُ, Abrogation) i.e. is it *Raf'* (الرَّفْعُ, Termination) or *Al-Bayân* (الْبَيَانُ , disclosure or revelation).

## الْفُرُوقُ الْفِقْهِيَّةُ

### (*Al-Furûq Al-Fiqhiyyah*)

### Realizing separate matters between two similar questions

At the beginning of the fourth century, *Al-Qawâ'id Al-Fiqhiyyah* became an autonomous science. Through the following, we will try to realize the meaning of "*Furûq*" (الْفُرُوقُ, Differences).<sup>90</sup> 'Umar Ibn Al-Khattâb رَضِيَ اللَّهُ عَنْهُ was called "*Al-Farûq*" (الْفَارُوقُ) because he was the one who distinguished the true (Islâm) from falsehood (disbelief).<sup>91</sup>

However, the science of *Al-Furûq* practically means realizing separate matters between two similar questions.<sup>92</sup>

Probably, the first one who had written in this topic was Imam Ibn Serîdj<sup>93</sup>. The mission of this science is to disclose the discrepancies of the causes and rules in the *fiqh* questions that are closely related to each other, or the questions that are similar only in their forms.

An example would be in the question whether a piece of speech is considered a *Shahâdah* (شَهَادَةٌ, testimony) or a *Riwâyah* (رَوَايَةٌ, narration of the Hadîth of the Prophet صلى الله عليه وسلم ) both are *Akhbâr* (أَخْبَارُ, news), but they are different in the following:

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<sup>90</sup> Plural of "*Farq*" and it literally means differences.

<sup>91</sup> **Al-Fairozabadî**, *Al-Qâmûs Al-Muhît*, p.1215.

<sup>92</sup> Muhammad Yâsîn Ibn 'Îsah **Al-Fadânî**, "Al-Fawâ'id Al-Jenniyyah Hâshiyat Al-Mawâhib As-Sunniyyah 'alâ Al-Farâ'id Al-Bahiyyah," Vol. 1, p. 1 in *Al-Qawâ'id Al-Fiqhiyyah*, ed. by Dr. **Nn-Nadawî**, p. 68.

<sup>93</sup> Ahmad Ibn 'Umar Ash-Shâfi'iy the greatest Faqîh of Shâfi'iyyah in his time born and died in Baghdad (d.306/918). See *Al-A'lâm* by **Az-Zarkkalî**, Vol. 1, p. 185.



1. *Ar-Riwâyah* is a report from the Prophet ﷺ, in contrast, *Ash-Shahâdah* belongs to the judge to prove judgments.
2. *Ash-Shahâdah* needs more than one person, while *Ar-Riwâyah* does not.
3. *Ash-Shahâdah* requires only men in some cases, whereas *Ar-Riwâyah* does not.
4. Slaves are not allowed to bear the responsibility of *Ash-Shahâdah* , while in *Ar-Riwâyah* they are allowed.
5. The one who repented from telling lies is not permitted to narrate Hadîth, but in *Ash-Shahâdah* he is.
6. *Ash-Shahâdah* comes after one person or some people file a lawsuit and an official summons by the judge; however, *Ar-Riwâyah* does not.

Finally, one can establish a similitude between *Al-Furûq Al-Fiqhiyyah* and *Al-Ashbâh Wan-Nazâ'ir*, where both of them handle branches of *Fiqh* or similar questions. However, *Al-Ashbâh Wan-Nazâ'ir* is wider in scope and it includes *Al-Furûq Al-Fiqhiyyah*.

### **Part III.**

القَوَائِدُ الْكُلِّيَّةُ الْكُبْرَى

***Al-Qawâ'id Al-Kulliyyah Al-Kubrâ***  
**(Normative Legal Maxims)**

القَوَائِدُ الْكُلِّيَّةُ الْكُبْرَى  
***Al-Qawâ'id Al-Kulliyyah Al-Kubrâ***  
**(Normative Legal Maxims)**

Most of the scholar agree on five maxims as *Al-Qawâ'id Al-Fiqhiyyah* Al-the are fifth *Qawâ'id* as most scholars agree. A student may notice that *Al-Qawâ'id Al-Kubrâ*. These five maxims or (*Qawâ'id*) are considered the pillars of Islamic *Fiqh*.

Imâm As-Seyûtî mentioned that judge Hussein Ibn Muhammad Ibn Ahmad Al-Marûdhî (d.462/1070) summarized the entire Shafi'iy *Madhhab* in four maxims or (*Qawâ'id*):

1. *Qâ'idah*: “((الْيَقِينُ لَا يَزُولُ بِالشَّكِّ)) - *Al-yaqîn lâ yazûl de ash-shakk*” (Certainty is not overruled by doubt)”
2. *Qâ'idah*: “((الْمَشَقَّةُ تَجْلِبُ التَّيْسِيرَ)) - *Al-mashaqqah tajleb at-tiysîr*” (Hardship begets ease)”
3. *Qâ'idah*: “((الضَّرَرُ يُزَالُ)) - *Lâ darar wa lâ dirâr*” (There is to be no harm, and no reciprocating harm)” and
4. *Qâ'idah*: “((الْعَادَةُ مُحَكَّمَةٌ)) - *Al- 'âdah muhakkamah*” (Custom is the basis of judgement)”.

Yet, many other scholars add the *Qâ'idah*:

5. “((الْأُمُورُ بِمَقَاصِدِهَا)) - *Al-umûr be maqâsidihâ*” (Acts are judged by the intention behind them or take the will for the deed)”.<sup>94</sup>

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<sup>94</sup> Al-‘Alâ’î stated that it is very good, in addition, ash-Shâfi’iy stated that this Hadîth (the fifth *Qâ'idah*) includes two third of the knowledge. See **As-Seyûtî**, *Al-Ashbâh Wan-Nazâ'ir*, p.8.

الْفَائِدَةُ الْكُلِّيَّةُ الْكُبْرَى الْأُولَى

### The First *Qâ'idah Kulliyyah Kubrâ*

"الْأُمُورُ بِمَقَاصِدِهَا"

(*Al-Umur be maqâsidihâ*)

Acts are judged by the intention behind them

Imâms Ash-Shafi'î, Ahmad Ibn Hanbal, Ibn Mahdî, Ibn Al-Madinî, Abû Dawûd, ad-Daraqotnî and others thought that the Hadîth concerning *An-Niyyah* (نية, intention) is a third or fourth of knowledge of Islâm.<sup>95</sup>

*Al-Qâ'idah* literally means that actions and behavior are judged by intentions. In addition, it practically means that a person is accounted by his intention and goal. Even though the maxim is self-evident, the Qur'ân and the Sunnah are the main source for this *Qâ'idah*.

#### First, from the Qur'ân:

Allâh says:

(لَا يُؤَاخِذُكُمُ اللَّهُ بِاللَّغْوِ فِي أَيْمَانِكُمْ وَلَكِنْ يُؤَاخِذُكُمْ بِمَا كَسَبَتْ قُلُوبُكُمْ وَاللَّهُ غَفُورٌ حَلِيمٌ)

(Allâh will not call you to account for that which is unintentional in your oaths, but He will call you to account for that which your hearts have earned. And Allâh is Oft-Forgiving, Most-Forbearing. )

(*Sûrah 2. Al-Baqarah, Âyah 225*)

Ibn Hazm commented on this *Âyah* saying that the soul is the object that is being commanded to do acts; yet the body is its machine, so should the soul

<sup>95</sup> As-Seyûtî, *Al-Ashbâh Wan-Nazâ'ir*, p.40.

intend to do something by its machine (the body), there can be nothing except what the soul has intended before.<sup>96</sup>

## **Second: from the Sunnah:**

حَدَّثَنَا الْحُمَيْدِيُّ عَبْدُ اللَّهِ بْنُ الزُّبَيْرِ قَالَ حَدَّثَنَا سُفْيَانُ قَالَ حَدَّثَنَا يَحْيَى بْنُ سَعِيدٍ الْأَنْصَارِيُّ قَالَ أَخْبَرَنِي مُحَمَّدُ بْنُ إِبْرَاهِيمَ التِّيمِيُّ أَنَّهُ سَمِعَ عَلْقَمَةَ بْنَ وَقَّاصٍ اللَّيْثِي يَقُولُ سَمِعْتُ عُمَرَ بْنَ الْخَطَّابِ رَضِيَ اللَّهُ عَنْهُ عَلَى الْمَنَبْرِ قَالَ سَمِعْتُ رَسُولَ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ يَقُولُ: (إِنَّمَا الْأَعْمَالُ بِالنِّيَّاتِ وَإِنَّمَا لِكُلِّ امْرِئٍ مَا نَوَى فَمَنْ كَانَتْ هِجْرَتُهُ إِلَى دُنْيَا يُصِيبُهَا أَوْ إِلَى امْرَأَةٍ يَنْكِحُهَا فَهِجْرَتُهُ إِلَى مَا هَاجَرَ إِلَيْهِ).

Narrated Al-Humaidi ‘Abdullâh ibn Az-Zubiyir that Sufyân that Yahiyah ibn Sa‘id Al-Ansâriy that Muhammad ibn Ibrâhîm At-Tiymiy that ‘Alqamah ibn Waqqâs Al-Liysiy that ‘Umar Ibn Al-Khattâb: رضي الله عنه

Allâh's Messenger صلى الله عليه وسلم said, “The reward of deeds depends on the intentions and every person will get the reward according to what he has intended. So whoever emigrates for Allâh and His Messenger, his emigration will be for Allâh and His Messenger and whoever emigrates for worldly benefits or for a woman to marry, his emigration will be for what he emigrated for.”<sup>97</sup>

In another Narration:

حَدَّثَنَا يَحْيَى بْنُ قَزَعَةَ حَدَّثَنَا مَالِكٌ عَنْ يَحْيَى بْنِ سَعِيدٍ عَنْ مُحَمَّدِ بْنِ إِبْرَاهِيمَ بْنِ الْحَارِثِ عَنْ عَلْقَمَةَ بْنِ وَقَّاصٍ عَنْ عُمَرَ بْنِ الْخَطَّابِ رَضِيَ اللَّهُ عَنْهُ قَالَ: قَالَ النَّبِيُّ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ: ( الْعَمَلُ بِالنِّيَّةِ وَإِنَّمَا لِامْرِئٍ مَا نَوَى فَمَنْ كَانَتْ هِجْرَتُهُ إِلَى اللَّهِ وَرَسُولِهِ فَهِجْرَتُهُ إِلَى اللَّهِ وَرَسُولِهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ وَمَنْ كَانَتْ هِجْرَتُهُ إِلَى دُنْيَا يُصِيبُهَا أَوْ امْرَأَةٍ يَنْكِحُهَا فَهِجْرَتُهُ إِلَى مَا هَاجَرَ إِلَيْهِ ).

<sup>96</sup> ‘Alî Ibn Ahmad Ibn Sa‘id **Ibn Hazm**, *Al-Ihkâm fî Usûl Al-Ahkâm*, Vol.5, p.132. Cairo, Egypt: Dâr-Al-Hadîth Press. Volume 8, 1404/1984.

<sup>97</sup> Summarized Sahîh Al-Bukhârî Arabic –English, chapter: The Book of Revelation, 1.

Narrated Yahyâ ibn Qaz'ah that Mâlik that Yahyâ ibn Sa'îd that Muhammad ibn Al-Hârith 'Alqamah ibn Waqqâs Al-Liysiy that 'Umar Ibn Al-Khattâb رضي الله عنه: Allâh's Messenger صلى الله عليه وسلم said, "The reward of a deed depends on the intention and every person will get the reward according to what he has intended. So whoever emigrates for Allâh and His Messenger, his emigration will be for Allâh and His Messenger and whoever emigrates for worldly benefits or for a woman to marry, his emigration will be for what he emigrated for." 98

### **An applicable example for this *Oâ'idah***

- The difference between an intended murder and a killing by accident.

### **Why must *Niyyah* be present?**

- a) To distinguish between a deed that is for the pleasure of Allah, or an act of worship (عبادة) and the deed that is not.
- b) To distinguish between *Ibadât* themselves. *Sawm* (صَوْم) 99 or *Hajj* (حَجّ, pilgrimage to Makkah).
- c) To distinguish between the Hukum of the deed, whether it a *Wâjib* (وَاجِب) 100, a *Nafl* (نَفْل, optional worship) or a vow to Allâh, the Most High.

### **Where is *Niyyah* ?**

Except for Hajj and Umra, the heart is the place of *Niyyah*. However, ibn Nujaim stated that: "Uttering of what is in the heart is *Bid'ah* in all acts of worship, comparing to *Niyyah* of Salâh that is only better when determination of a person is absent." 101

<sup>98</sup> Sahîh Al-Bukhârî, chapter: The Book of Revelation, 4783.

<sup>99</sup> Fasting, to abstain from food, drink and sexual intercourse before the break of the dawn till sunset.

<sup>100</sup> Duty, obligation task, assignment, and so on.

<sup>101</sup> Zain-ud-Dîn Ibn Ibrâhîm **Ibn Nujaim**, Al-Bahr ar-Râ'iq Sharh Kanz ad-Daqâ'iq, Vol.2, p.346. Beirut: Dâr al-Ma'rifâh Press.

“Should a man utter something which is different from what that is in his heart, what is in his heart takes the priority over what he utters,” all *Madhâhib* observe. In addition, avoiding *Harâm* does not require *Niyyah*.<sup>102</sup>

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<sup>102</sup> The previous source, p. 171.

القَوَائِدُ الْمُتَفَرِّعَةُ عَلَى الْقَاعِدَةِ الْكُلِّيَّةِ الْكُبْرَى الْأُولَى

*Qawâi'd* (Legal Maxims) come under the first *Qâ'idah Kulliyyah Kubrâ*  
(Normative Legal Maxims)

"قَاعِدَةُ الْأُمُورِ بِمَقَاصِدِهَا"

(*Al-Umur be maqâsidihâ*)  
Acts are judged by the intention behind them



## Al-Qâ'idah no.1

العِبْرَةُ فِي الْعُقُودِ بِالْمَقَاصِدِ وَالْمَعَانِي لَا بِالْأَلْفَافِ وَالْمَبَانِي

(Al- 'Ibrah fî al- 'uqûd be al-maqasid wa al-ma 'ânî lâ be al-Alfâz wa al-mabânî)

The essence in contracts is their goals and meanings not their words or forms

This *Qâ'idah* means that the words used in a contract are not as important as their aims and meanings. Therefore, if there is a discrepancy between the terms and the meanings of a contract, the priority is given to the meanings. Also, an invalid condition spoils a contract whether it was mentioned in the contract or not, like *Al-Muhalil* (المُحْلِل) <sup>103</sup> which is prohibited (*Harâm*) in Islâm.<sup>104</sup>

### Applicable examples for this Qâ'idah

- If a person says to another, "I give you my yacht as *Hebah* (هَبَّة) <sup>105</sup> in return for a sum of money," this is not considered as *Hebah* but a sale, as the price is stipulated.
- If a person says to another, "You render me a sum of money immediately, and I will lend you a small amount of land" this is

<sup>103</sup> The man who marries an irrevocable divorcee in order to make her lawful for her former husband if he wishes to marry her. Moreover, this marriage, with no condition in the contract, is correct according to Hanafiyyah but correct and disliked according to Shâfi'iyyah. It, however, is *Harâm*, even there is no condition on the contract, according to Mâlikiyyah and Hanabelah. See *Al-Mawsû'ah Al-Fiqhiyyah Al-Kuwaitiyyah*. Kuwait: Ministry of Waqf and Islamic Affairs. (2006-1984/1427-1404), Vol. 10, p257.

<sup>104</sup> Muhammad Sâlih Ibn 'Uthiymîn, *Al-Qawâ'id Al-Fiqhiyyah*, p.72. Alexandria, Egypt: Dâr-Al-Basîrah Press, 1422/2002.

<sup>105</sup> To give someone something immediately and without exchange.

considered to be a renting contract, *Ijârah* (إِيجَارَةٌ)<sup>106</sup> and not a lending one, *I'ârah* (إِعَارَةٌ, loan).

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<sup>106</sup> The use and enjoyment of property for a time, includes hire, rental, and lease.

## Al-Qâ'idah no.2

هَلِ النِّيَّةُ تُخَصِّصُ اللَّفْظَ الْعَامَّ أَوْ تُعَمِّمُ اللَّفْظَ الْخَاصَّ؟

(*Hall an-niyyah tukhassses al-lafz al- 'âm aw tu 'ammem al-lafz al-khâss?*)

Does intention particularize a general discourse or generalize a particular discourse?

Mâlikkiyyah and Hanabelah agree that an intention *Niyyah* particularize the general words and may generalize the particular words. Ash-Shâfi'iyyah, on the other hand, states that *Niyyah* could particularize general words, but it may not generalize specific statements in oaths. Hanafiyyah considers that *Niyyah* may possibly particularize general words when the matter is between a person and Allâh. But if the matter is between one person and others, *Niyyah* does not particularize a general statement.

### Applicable examples for this Qâ'idah

- When an owner of multiple companies says, "I am dismissing the entire workers"; then, he says, "In fact, I intended workers from a particular company," the majority of scholars accept this *Takhsîs* (تَخْصِيسٌ)<sup>107</sup>.
- If Y has taken an oath that he would not talk to people; then, he claimed that he intended Z in particular, his oath is broken when he speaks to any person other than Z, according to Mâlikiyyah, Hanabelah, Shâfi'iyyah and Al-Khessâf (a scholar of Hanafiyyah). His oath is legally violated, and he needs to pay the *Kaffârah* according to the majority of Hanafiyyah.<sup>108</sup>

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<sup>107</sup> Specialization, specification, and so on.

<sup>108</sup> The previous source, pp.152-153.

- When a spouse says to his wife, “If you wear a dress, you are divorced”; yet, after that he claims that he meant a particular dress, it is religiously accepted. However, with respect to justice, there are two opinions, according to the majority of Hanabelah.<sup>109</sup>

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<sup>109</sup> The previous source, pp. 152-153.

### Al-Qâ'idah no.3

هَلْ الْإِيْمَانُ مَبْنِيَّةٌ عَلَى الْأَلْفَافِ أَمْ عَلَى الْأَغْرَافِ ؟

(Hall El-Aiymân Mabniyyah 'alâ Al-Alfâz aw 'alâ Al-Aghrâd?)

Do oaths lean on discourses or on purposes?

Mâlikkiyyah and Hanabelah concluded that words used in *Al-Aiymân* (الْإِيْمَانُ, oaths) are based on the *Niyyât* (نِيَّاتٌ, intentions) whether the oath is appropriate for *Zâhir Al-Lafz* (ظَاهِرُ اللَّفْظِ, apparent meaning) or not.

On the other hand, the Hanafiyyah and Shâfi'iyyah observe that *Al-Aiymân* are contingent on a discourse if the discourse is used in those *Aiymân*, otherwise *Al-Aiymân* are built on *Niyyah*.

#### An Applicable example for this Qâ'idah

- If a person made an oath that he will not sell certain goods for ten dollars, and yet he sold it for nine dollars or eleven dollars, his oath will not be considered broken even if he intended to increase the price to ten. Such is because there is no *Hinth* (حَنْثٌ)<sup>110</sup> except by word/s according to Hanafiyyah and Shâfi'iyyah<sup>111</sup>. His oath, however, is violated according to Mâlikkiyyah and Hanabelah<sup>112</sup>

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<sup>110</sup> Breaking/violating of the oath.

<sup>145</sup> Ibn Nujaim, *Al-Ashbâh Wan-Nazâ'ir*, p.57.

<sup>112</sup> Dr. Al-Bornû, *Al-Wajîz*, p.156.

### Al-Qâ'idah no.4

هَلْ الْأَيْمَانُ مَبْنِيَّةٌ عَلَى الْعُرْفِ؟

(*Hall al-aiymân mabniyyh 'alâ al-'urf?*)

Are the words employed in oaths built on tradition?

According to an opinion of Hanafiyyah and Hanabelah, *Al-Aiymân* (oaths) are built on *'Urf* (tradition) of the one who takes an oath, only if they are not based on the meaning of the *Shar'* (شَرْع, Islamic terms).

Mâlikkiyyah observe that *Oaths, or Al-Aiymân* in general are contingent first on a person's *Niyyah*, on motive (in case he has no *Niyyah*), on *'Urf* (if he has no motive) or on the linguistic rules.<sup>113</sup>

### An Applicable example for this Qâ'idah

- If a person made an oath to dwell in a house (*Bait*)<sup>114</sup> and still resides in a tent, his oath will not be broken if he is of the people of the city; yet his oath will be violated if he is among the Bedouins, since Bedouines surly mean a built house when they reference the word "Bait".

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<sup>113</sup> Abû Bakr Ibn Hasan **Al-Kishnâwî**, As-hal Al-Madârîk Sharh Irshâd Al-Masâlik fî Fiqh Imâm Al-A'imma Mâlik, Vol. 2, p.23. Cairo, Egypt: 'Isâ Al-Bâbiy Al-Halabiy Press, 1<sup>st</sup>. ed.

<sup>114</sup> A building which people, usually one family, live in.

## Al-Qâ'idah no. 5

هَلِ الْيَمِينُ عَلَى نِيَّةِ الْحَالِفِ أَوْ الْمُسْتَخْلِفِ؟

(*Hall al-aymân 'alâ niyyat al-halîf aw 'alâ niyat al-mustahlif* ?)

Does an oath rely on the intention of the one who swears or on the intention of the one who adjures another person to swear?

In court, *Al-Yamîn* (oath) depends on the *Niyyah* of the one who swears if he is innocent and on the judge's (in court) if the person is guilty.<sup>115</sup> For divorce or emancipation, however, according to Hanafiyyah, *Al-Yamîn* is contingent on the *Niyyah* of the one who swears whether he is innocent or guilty.

Mâlikkiyyah and Shâfi'iyyah believe that this is based on the *Niyyah* of the magistrate, and it does not accept concealment or exceptions. Hanabelah believe, on the other hand that it is built on the *Niyyah* of the one who takes an oath, if he is not guilty and when it is linguistically accepted.<sup>116</sup>

حَدَّثَنَا يَحْيَى بْنُ يَحْيَى وَعَمْرُو النَّاقِدُ - قَالَ يَحْيَى أَخْبَرَنَا هُشَيْمُ بْنُ بَشِيرٍ عَنْ عَبْدِ اللَّهِ بْنِ أَبِي صَالِحٍ وَقَالَ عَمْرُو حَدَّثَنَا هُشَيْمُ بْنُ بَشِيرٍ أَخْبَرَنَا عَبْدُ اللَّهِ بْنُ أَبِي صَالِحٍ - عَنْ أَبِيهِ عَنْ أَبِي هُرَيْرَةَ قَالَ قَالَ رَسُولُ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ ( يَمِينُكَ عَلَى مَا يُصَدِّقُكَ عَلَيْهِ صَاحِبُكَ ) . وَقَالَ عَمْرُو « يُصَدِّقُكَ بِهِ صَاحِبُكَ »

Narrated Yahyâ ibn Yahyâ and 'Amro an-Nâqid say Yahyâ narrated that Hushiym ibn Bashîr that 'Abdullâh ibn Abî Sâlih, and 'Amro says that Hushiym ibn Bashîr narrated that 'Abdullâh ibn Abî Sâlih that his father that Abî Hurairah رضى الله عنه:

Allâh's Messenger صلى الله عليه وسلم said, "Your oath, which an opponent believes, is contingent on the sense you mean."<sup>117</sup>

<sup>115</sup> **Al-Hamawiy**, *Ghamz 'Uoûn Al-Basâ'ir*, p.89.

<sup>116</sup> Dr. **Al-Bornû**, *Al-Wajîz*, p.158.

<sup>117</sup> **Sahîh Muslim**, chapter: the oath of the one who takes it is contingent on the *Niyyah* of the oath seeker, 4373.

This Hadîth means that the meaning of the oath is the conclusion that strikes the mind of the opponent/s and it is mostly in harmony with the apparent meaning. Therefore, most scholars observe., that the one who takes an oath should speak without equivocation, otherwise his oath is a false oath, immersing him in sin.

### **Mâlikiyyah:**

“An oath depends on the *Niyyah* (نِيَّةٌ, intention) of the oath seeker,” Sahnûn, Asbagh and ibn Al-Mawwâr stated. On the other hand, Ibn al-Qâsim stated: “An oath depends on the one who swears, and he can use exception, so he is not obliged to do *Kaffârah*, but that is forbidden,”.

### **Shâfi‘iyyah:**

The oath is on the *Niyyah* of the oath requester **on the condition that:**

1. He is among those who have the right to hear *Ash-Shahâdh* such as a judge, an arbitrator, a ruler; however, ibn ‘Abdus-Salâm added the opponent based on the Hadîth mentioned above.
2. He is the judge or the like depending on a request from the rival; yet, if there is no request from the opponent, the oath is contingent on the *Niyyah* of the one who takes an oath.
3. He does not swear an oath of something (even if he tells the truth) other than what the rival adjures him to take an oath of.
4. He swears to Allâh except the claimant wants him to swear using words of divorce (Hanafiyy *Madhhab*). In that case, the oath will be on *Niyyah* of the applicant.<sup>118</sup>

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<sup>118</sup> Al-Mawsû‘ah Al-Fiqhyiah Al-Kuwaitiyyah, Vol. 7, p.305-307.



## قَاعِدَةُ مُسْتَثْنَاءٍ مِّنَ الْقَاعِدَةِ الْكُلِّيَّةِ الْكُبْرَى الْأُولَى

Excluded *Qâ'idah* (A legal Maxim) from the First *Qâ'idah Kulliyyah Kubrâ* (Normative legal Maxims)

"قَاعِدَةُ الْأُمُورِ بِمَقَاصِدِهَا"

(*Al-Umur be maqâsidihâ*)

Acts are judged by the intention behind them

مَنْ اسْتَعْجَلَ الشَّيْءَ قَبْلَ أَنْ يَحُوقِبَهُ بِحَرْمَانِهِ

(*Mann Ista'jal ash-shai'a qabl awânih 'uqeb be hermânih*)

When someone rushes into something before its due time, he is punished  
by depriving

This *Qâ'idah* has come in more than a few paraphrases; however, all of them bear the same meaning. The first one has been paraphrased by Hanafiyyah:

”مَنْ اسْتَعْجَلَ مَا أَخْرَهُ الشَّرْعُ يُجَازَى بِرَدِّهِ”

(*Mann ista'jal mâ akhrah ash-shar' yujâzâ be raddih*) **Whoever hastens what is postponed by *Shar'* (teachings of Islâm), is enforced by threat of punishment to render it back,”** and the second one is worded by Mâlikiyyah:

”الْأَصْلُ الْمُعَامَلَةُ بِنَقِيدِ الْمَقْصَدِ الْفَاسِدِ”

(*Al-asl al-mu'amalah be naqîd al-maqsad al-fâsid*) **Whoever has a corrupted aim (or act) perpetrating or trying to commit it, will be faced with a reciprocal action under threat of punishment.”**

### **Applicable examples for this *Qâ'idah***

- If a person has deliberately taken his testator's or legator's life, he will be deprived of inheritance.
- When one, in last illness, divorces his wife, without her acceptance, to prevent her from inheritance; then, he died during her '*Iddah* (عِدَّةٌ)<sup>119</sup>, she will inherit her share of his inheritance.

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<sup>119</sup> A period of probation after the death of her husband or after her divorce.

- When it is proved that a person bribes someone to do something, the former is punished by depriving him from that thing.

## الْقَاعِدَةُ الْكُلِّيَّةُ الْكُبْرَى الثَّانِيَّةُ

### The Second *Qâ'idah Kulliyyah Kubrâ*

الْيَقِينُ لَا يَزُولُ بِالشَّكِّ

(*Al-yaqîn lâ yazûl be ash-shakk*)

Certainty is not overruled by doubt

“This *Qâ'idah* has been included in all chapters of *Fiqh* and the questions which are being extracted from it are more than 3/4 of *Fiqh*,” Imâm As-Seyûtî stated.<sup>120</sup> In addition, Imâm Al-Qarâfiy asserted that this *Qâ'idah* is accepted by scholars, and it means that suspected matters are supposed to be a nonentity.<sup>121</sup>

Basically, the *Qâ'idah* means that a matter which is certain cannot be removed except by decisive evidence, and it must not be cancelled or abrogated by mere suspicions.<sup>122</sup>

### **Degrees of Realization:**

- *Al-Yaqîn* (الْيَقِينُ, certainty) is a confirmed frame based on a decisive proof.
- *Al-I'tiqâd* (اِعْتِقَادٌ, belief) is a confirmed frame even without a decisive proof.
- Hesitance between two equal matters (A and B), which is referred to as *Shakk* (شَكٌّ, doubt).

<sup>120</sup> As-Seyûtî, *Al-Ashbâh Wan-Nazâ'ir*, p.51.

<sup>121</sup> Al-Qarâfiy, *Anwâr AL-Borûq*, Vol. 1, p.111.

<sup>122</sup> Khalid ibn Muhammad Al-Atâsî, *Sharh Majalat Al-Ahkâm Al-'Adliyyah*, Vol.1, p.32.

- Choosing a matter (A) while still doubting (B) leads to *Zunn* (ظَنُّ, conjecture).
- The abundance of (B) leads to *Ghalabatuz-AZunn* (غَلَبَةُ الظَّنِّ, a strong probability).
- If both matters were fragile but one of them was frailer than the other, this leads to *Wahm* (وَهْمٌ, illusion).<sup>123</sup>

### **Evidences from the Qur'ân:**

Allâh says:

(وَمَا يَتَّبِعْ أَكْثَرُهُمْ إِلَّا ظَنًّا إِنَّ الظَّنَّ لَا يُغْنِي مِنَ الْحَقِّ شَيْئًا إِنَّ اللَّهَ عَلِيمٌ بِمَا يَفْعَلُونَ)

(And most of them follow nothing but conjecture. Certainly, conjecture can be of no avail against the truth. Surely Allâh is All-Aware of what they do.)

(Sûrah 10. Yûnus, Âyah 36)

In the next *Âyât* (آيَاتُ, verses, signs, etc.) there are three degrees of realization:

Allâh says:

(وَقَوْلِهِمْ إِنَّا قَتَلْنَا الْمَسِيحَ عِيسَى ابْنَ مَرْيَمَ رَسُولَ اللَّهِ وَمَا قَتَلُوهُ وَمَا صَلَبُوهُ وَلَكِنْ شُبِّهَ لَهُمْ وَإِنَّ الَّذِينَ اخْتَلَفُوا فِيهِ لَفِي شَكٍّ مِّنْهُ مَا لَهُمْ بِهِ مِنْ عِلْمٍ إِلَّا اتِّبَاعَ الظَّنِّ وَمَا قَتَلُوهُ يَقِينًا بَلْ رَفَعَهُ اللَّهُ إِلَيْهِ وَكَانَ اللَّهُ عَزِيزًا حَكِيمًا)

(And because of their saying (in boast), “We killed Messiah Jesus, son of Mary, the Messenger of Allâh ﷺ”, -- but they killed him not, nor crucified him, but the resemblance of Jesus was put over another man (and they killed the man), and those who differ therein are full of doubts. They have no (certain) knowledge, they follow nothing but conjecture. For surely; they killed him not (i.e. Jesus son of Mary): (158) But Allâh raised him (Jesus) up (with his body and soul) unto Himself (and he ﷺ is in the Heavens). And Allâh is Ever All-Powerful, All-Wise.)

(Sûrah 4. An-Nisâ', Âyât 157-158)

<sup>123</sup> Dr. Al-Bornû, Al-Wajîz, p.168.

### **From the Sunnah:**

حَدَّثَنَا عَلِيُّ قَالَ حَدَّثَنَا سُفْيَانُ قَالَ حَدَّثَنَا الزُّهْرِيُّ عَنْ سَعِيدِ بْنِ الْمُسَيَّبِ عَنْ عَبَادِ بْنِ تَمِيمٍ عَنْ عَمِّهِ أَنَّهُ شَكَاَ إِلَى رَسُولِ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ الرَّجُلُ الَّذِي يُخَيِّلُ إِلَيْهِ أَنَّهُ يَجِدُ الشَّيْءَ فِي الصَّلَاةِ ؟ فَقَالَ: ( لَا يَنْفَتِلُ - أَوْ لَا يَنْصَرِفَ - حَتَّى يَسْمَعَ صَوْتًا أَوْ يَجِدَ رِيحًا ).

Narrated ‘Alî that Suf yân that Az-Zuhrî that Sa’îd ibn al-Musiyb that ‘Abbâd Ibn Tamîm that Ibn Tamîm's cousin Narrated Abdullâh Ibn Yazîd Al-Ansarî رضي الله عنه, that he asked Allâh's Messenger صلى الله عليه وسلم about a person who imagined to have passed wind during the Salâh: Allâh's Messenger صلى الله عليه وسلم replied, “He should not leave his Salâh unless he hears sound or smells an odour.”<sup>124</sup>

Imâm an-Nawawî asserted that this Hadîth is among the *Usûl* of Islâm meaning that things survive counting on their *Usûl* until something authenticated changes them, and unanticipated doubt has no influence on them.<sup>125</sup>

### **Logically:**

Certainty is stronger and wiser than uncertainty since it has an exact and a decisive judgment; besides, it cannot be easily defeated by suspicions.<sup>126</sup>

### **Ghalabatuz-Zunn (very likelihood):**

People should perform ordinances of Sharî’ah relying on *Al-Yaqîn* (certainty), or on *Ghalabatuz-Zunn* (a strong probability) if they cannot.

The commands of Sharî’ah are clear, but sometimes a person cannot fulfill one of them with certainty. In that case, he can trust *Ghalabatuz-Zunn* of that command since ordinances coming from Sharî’ah are subject to man's capability.

<sup>124</sup> Summarized Sahîh Al-Bukharî Arabic-English, chapter: Wudû’ (Ablution), 112.

<sup>125</sup> Mohyed-Dîn Yahyâ Ibn Sharaf **An-Nawawî** (d.676/1277), Sharh An-Nawawî ‘alâ Sahîh Muslim, Vol.4, pp.49-50. Beirut, Lebanon: Dâr Ibn Ihyâ’ At-Turâth Al-‘arabiy Press. Volume 9, 2<sup>nd</sup>. ed., 1392/1972.

<sup>126</sup> Dr. **Az-Zurqqâ**, Al-Madkhal, Vol. 2, p.981, chapter 81, passage 6.

## **Evidence:**

Allâh says:

(... لَا يُكَلِّفُ اللَّهُ نَفْسًا إِلَّا وُسْعَهَا...)

(Allâh burdens not a person beyond his scope....)

(Sûrah 2. Al-Baqrah, Âyah 286)

حَدَّثَنَا عُثْمَانُ قَالَ حَدَّثَنَا جَرِيرٌ عَنْ مَنْصُورٍ عَنْ إِبْرَاهِيمَ عَنْ عَلْقَمَةَ قَالَ قَالَ عَبْدُ اللَّهِ: صَلَّى النَّبِيُّ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ - قَالَ إِبْرَاهِيمُ لَا أَدْرِي - زَادَ أَوْ نَقَصَ فَلَمَّا سَلَّمَ قِيلَ لَهُ يَا رَسُولَ اللَّهِ أَحَدَثَ فِي الصَّلَاةِ شَيْءٌ؟ قَالَ: (وَمَا ذَاكَ) . قَالُوا صَلَّيْتَ كَذَا وَكَذَا فَتَنَّى رَجُلِيهِ وَاسْتَقْبَلَ الْقِبْلَةَ وَسَجَدَ سَجْدَتَيْنِ ثُمَّ سَلَّمَ . فَلَمَّا أَقْبَلَ عَلَيْنَا بِوَجْهِهِ قَالَ: (إِنَّهُ لَوْ حَدَّثَ فِي الصَّلَاةِ شَيْءٌ لَنَبَأْتُكُمْ بِهِ وَلَكِنْ إِنَّمَا أَنَا بَشَرٌ مِثْلُكُمْ أَنْسَى كَمَا تَنْسَوْنَ فَإِذَا نَسِيتُ فَذَكِّرُونِي وَإِذَا شَكُّ أَحَدُكُمْ فِي صَلَاتِهِ فَلْيَتَحَرَّ الصَّوَابَ فَلْيَتِمَّ عَلَيْهِ ثُمَّ لِيُسَلِّمْ ثُمَّ يَسْجُدْ سَجْدَتَيْنِ) .

Narrated ‘Uthmân that Jarîr that Mansûr that Ibrâhîm that ‘Alqamah that ‘Abdullâh Ibn Mas‘ûd رَضِيَ اللَّهُ عَنْهُ:

The Prophet صلى الله عليه وسلم prayed (and the sub narrator Ibrahim said, “I do not know whether he prayed more or less than usual”), and when he finished the Salâh he was asked, “O Allah's Messenger! Has there been any change in the Salâh? He صلى الله عليه وسلم said, “What is it? The people said, “You have prayed such and such.” Therefore, the Prophet صلى الله عليه وسلم bent his legs, faced the *Qiblah* (الْقِبْلَةُ, the direction of Salâh) and performed two prostrations (of سَهْوٌ, *Sahw*) and finished his prayers with *Taslîm* (تَسْلِيمٌ).<sup>127</sup> When he turned his face to us he said, “If there had been anything changed in the prayer, surely I would have informed you but I am a human being like you and liable to forget like you. So if I forget, remind me and if anyone of you is doubtful about his prayer, **he should do his best to reach the truth**, complete his prayer accordingly, finish it and do two prostrations of *Sahw*.”<sup>128</sup>

<sup>127</sup> *Sahw*, here, means forgetting how many *Raka'ât* a person has prayed, in which case he should perform two prostrations of *Sahw*. This is after *Taslîm*: On finishing the prayer; one turns his face to the right and then to the left saying, Assalâm ‘Alaikum wa Rahmtullâh (Peace and Mercy of Allâh be on you).

<sup>128</sup> *Sahîh Al-Bukhârî*, chapter: Facing the Qiblah, 392.

Commenting on “**he should do his best to reach the truth**”, one ought to depend on *Ghalabatuz-Zunn* of the matter that comes into one's mind. The considerable *Zunn*, here, must be constructed on the correct research into evidence and inference, otherwise it should be neglected.<sup>129</sup>

### **Applicable examples for this *Oâ'idah***

- Chapters of *Fiqh* concerning removing *Najâsah* (نَجَاسَةٌ, impurity) and sail are based on *Ghalabatuz-Zunn*.
- Numerical acts of worship, when one fails to recall one or some of them, he has to build his decision on *Ghalabatuz-Zunn*. But if he cannot remember anything that he did, he should construct his decision on the least number.<sup>130</sup>
- If a person suspects whether or not his new garment is *Tâhir* (pure or clean), he should conclude that it is.

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<sup>129</sup> Walîd Ibn Rashdân **As-Sa'idân**, Al-Iktifâ' bel-'Amal beghalabat-ez-Zunn fî Al-Masâ'il Al-Fiqhiyyah, p.6.

<sup>130</sup> The previous source, pp. 6-7.



## القَوَائِدُ الْمُتَفَرِّعَةُ عَلَى الْقَاعِدَةِ الْكُلِّيَّةِ الثَّانِيَةِ

*Qawâ'id* (Legal Maxims) come under the second *Qâ'idah Kulliyyah Kubrâ* (Normative Legal Maxims)

"الْيَقِينُ لَا يَزُولُ بِالشَّكِّ"

(*Al-yaqîn lâ yazûl be ash-shakk*)  
Certainty is not overruled by doubt

## **Al-Qâ'idah no. 1**

الأصلُ بَرَاءَةُ الذَّمِّ

(*Al-Asl Barâ'tudh-Dhemmah*)

Non-liability or man is absolved from guilt, blame or responsibility for any wrong deed in principle

This *Qâ'idah* practically means that in principle, and to start with, a person is innocent of any claims or accusations.

### **Applicable examples for this Qâ'idah**

- Based on this maxim, a thought alone that one owes others is not by itself a proof for that.<sup>131</sup>

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<sup>131</sup> Khawâjah Amîn Afandî 'Alî Hiydar Durar Al-Hukkâm, Vol. 1, p. 20. Translated and verified by Fahmy Al-Husainî. Beirut, Lebanon. Volume 4.

## Al-Qâ'idah no. 2

مَا ثَبَتَ بِبَيِّنٍ لَا يَرْتَفَعُ إِلَّا بِبَيِّنٍ

(*Mâ thabat be yaqîn lâ yartaf' illâ be yaqîn*)

Whatever is proved true with certainty, cannot be cancelled but by proof

There are some *Qawâ'id* related to this *Qâ'idah*:

”مَنْ شَكَّ هَلْ فَعَلَ شَيْئًا أَوْ لَا فَالْأَصْلُ أَنَّهُ لَمْ يَفْعَلْهُ”

(*Mann shakk hall fa'al shai' aw lâ fal-asl 'annahu lam yaf'alh*) Whoever is not sure whether he has done something or not, he certainly has not done it.

”مَنْ تَيَقَّنَ الْفَعْلَ وَشَكَّ فِي الْقَلِيلِ أَوْ الْكَثِيرِ حُمِلَ عَلَى الْقَلِيلِ لَأَنَّهُ الْمُتَيَقَّنُ”

(*Mann tayaqan al-fa'l wa shakk fî al-qalîl aw al-kathîr humel 'alâ al-qalîl la'annahu al-mutayaqan*) Whoever has certainly done something; then, he doubts whether he did it more or less than required, his verdict is better to be contingent on the lesser number as it is proved true.”

### Applicable examples for this *Qâ'idah*

- A doubt whether a person has performed *Salâh* or not, does not obligate the person to repeat the *Salâh* as long as its time has passed.
- Should an individual not be certain how many *Raka'ât* he has performed, the lesser number is counted as performed.<sup>132</sup>

<sup>132</sup> As-Seyûtî, *Al-Ashbâh Wan-Nazâ'ir*, p.55.

### **Al-Qâ'idah no. 3**

الأَصلُ العَدَمُ . الأَصلُ فِي الصِّفَاتِ أَوْ الأُمُورِ العَارِضَةُ العَدَمُ

(*Al-asl al- 'adam aw al-asl fî as-sifât aw al-umûr al- 'âredh al- 'adam*)  
Occasional descriptions or matters are not reliable in principle

Practically, this *Qâ'idah* shows that descriptions are of two kinds; genuine and occasional. The genuine one is the early description of the described object like the wealth of *Al-Mudârabah* (المضاربة)<sup>133</sup> before investing in *Al-Mudârabah*.

An occasional description, on the other hand, is a late description of the described object such as the wealth of *Al-Mudârabah* after incurring profit or loss.<sup>134</sup>

Therefore, when two people differ in an accidental description of something and one of them has negated that description, the negation has the priority over the other opinion if it is confirmed by an oath.

### **Applicable examples for this Qâ'idah**

- When one purchases a machine or a device with a certain basic description; then, he finds that the item does not fit that description; he has the right to be recompensed for the fault or to receive a refund, since the specification did not match with what was agreed on.

<sup>133</sup> A contract of copartnership, of which the one party (namely the proprietor) is entitled to a profit on account of the stock, he being denominated *Rab-ul-mâl*, or proprietor of the stock, and the other party is entitled to a profit on account of his labor, and this last one is called the *mudârib* (or manager). A contract of *mudârabah* cannot be established without participation in the profit. See Dictionary of Islamic Terms, Arabic-English by Deeb Al-Khudrawî, first ed. 1416-1995 Al-Yamamah Damascus.

<sup>134</sup> Dr. **Al-Bornû**, Al-Wajîz, p.184.

- If a person claims that he owed another person some money or if there was an evidence to confirm that; and if he then alleged that he had paid off the debt and if the creditor renounced that, the ruling here, is in favor of his rival after taking an oath. The debt is still incumbent on the debtor, and that is the principle (*Asl*). Therefore, he is required to either pay the debt or to present evidences (*Bayyinah* (بَيِّنَةٌ), *Burhân* (بُرْهَانُ) or *Dalîl* (دَلِيلُ)).<sup>135</sup>

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<sup>135</sup> Proof, evidence, demonstration, testimony, witness, and so on.

#### Al-Qâ'idah no. 4

الأصلُ إضافةُ الحدثِ إلى أقربِ أوقَاتِهِ

(*Al-asl idâfit al-hadath illâ aqrab awqâtih*)

In principle, any new events shall be regarded as happening at the nearest time to the present

Another form for this Qâ'idah is:

”الأصلُ في كُلِّ حَدَثٍ تَقْدِيرُهُ بِأَقْرَبِ زَمَنٍ”

(*Al-asl fî kull hadath taqdirih be aqrab zaman*. “When an incident takes place in a couple of different times, and people doubt about the precise time, they need to relate it to its nearest time.”) Since the farthest time is questionable, the nearest time is the one that counts.<sup>136</sup>

#### An applicable examples for this Qâ'idah

- In the event of noticing spots of sexual discharge on garments -and a person does not remember the reason behind this, he/she shall take a bath and repeat every Salâh performed after the last period of sleep.

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<sup>136</sup> **Al-Atâsî**, Sharh Majalat Al-Ahkâm, Vol.1, p.32.

## Al-Qâ'idah no. 5

هَلِ الْأَصْلُ فِي الْأَشْيَاءِ الْإِبَاحَةُ أَمْ الْحُرْمَةُ؟

(*Hal-asl fî al-ashiyâ' al-ibahah aw al-hurmah?*)

Should things, in principal, be permissible or forbidden?

The strongest ruling that most of scholars of Islam are in agreement with, is that things in principle are permissible.

Concrete proofs from the Noble Qur'ân:

Allâh Al-Karîm (الكَرِيمُ) the Bountiful) says:

(هُوَ الَّذِي خَلَقَ لَكُمْ مَّا فِي الْأَرْضِ جَمِيعًا ...)

(He it is Who created for you all that is on earth...)

(Sûrah 2. Al-Baqrah, Âyah 29)

In another place, Allâh says:

(قُلْ مَنْ حَرَّمَ زِينَةَ اللَّهِ الَّتِي أَخْرَجَ لِعِبَادِهِ وَالطَّيِّبَاتِ مِنَ الرِّزْقِ قُلْ هِيَ لِلَّذِينَ آمَنُوا فِي الْحَيَاةِ الدُّنْيَا خَالِصَةٌ يَوْمَ الْقِيَامَةِ كَذَلِكَ نَفْصِلُ الْآيَاتِ لِقَوْمٍ يَعْلَمُونَ)

(Say, (O Muhammad): "Who has forbidden the adornment with clothes given by Allâh, which He has produced for his slaves, and *At-Tayibat* (الطَّيِّبَاتُ), all kinds of *Halal* (حَلَالٌ, lawful) things] of food?" Say: "They are, in the life of this world, for those who believe, (and) exclusively for them (believers) on the Day of Resurrection (the disbelievers will not share them.)" ...)

(Sûrah 7. Al-'Arâf, Âyah 32)

Moreover, Allâh, Ar-Rahmân (الرَّحْمَنُ, The Most Beneficent) Ar-Rahîm (الرَّحِيمُ, The Most Merciful) says:

(قُلْ لَا أَجِدُ فِي مَا أُوحِيَ إِلَيَّ مُحَرَّمًا عَلَى طَاعِمٍ يَطْعَمُهُ إِلَّا أَنْ يَكُونَ مَيْتَةً أَوْ دَمًا مَسْفُوحًا أَوْ لَحْمَ خِنْزِيرٍ فَإِنَّهُ رَجْسٌ أَوْ فِسْقًا أَهْلًا لِّغَيْرِ اللَّهِ بِهِ فَمَنْ اضْطُرَّ غَيْرَ بَاغٍ وَلَا عَادٍ فَإِنَّ رَبَّكَ غَفُورٌ رَحِيمٌ)

(Say (O Muhammad ): "I find not in that which has been inspired to me anything forbidden to be eaten by one who wishes to eat it, unless it be *Maytah* (مَيْتَةً, a dead animal) or blood poured forth (by slaughtering or the like), or the flesh of swine (pork, etc.) for that surely is impure, or impious (unlawful) meat (of an animal) which is slaughtered as a sacrifice for others than Allâh (or has been slaughtered for idols, etc., or on which Allâh's Name has not been mentioned while slaughtering). But whosoever is forced by necessity without wilful disobedience, nor transgressing due limits, (for him) certainly, your Lord is Oft-Forgiving, Most Merciful.")

(Sûrah 6. Al-An'âm, Âyah 145)

Confirmation extracted from the Sunnah:

أَخْبَرَنَا جَعْفَرُ بْنُ مُحَمَّدٍ عَلَى الشَّيْبَانِي ثَنَا أَحْمَدُ بْنُ حَازِمٍ الْغَفَّارِيُّ ثَنَا أَبُو نُعَيْمٍ ثَنَا عَاصِمُ بْنُ رَجَاءٍ بْنُ حَيَّوَةَ عَنْ أَبِيهِ عَنْ أَبِي الدَّرْدَاءِ رَضِيَ اللَّهُ عَنْهُ رَفَعَ الْحَدِيثَ قَالَ: (مَا أَحَلَّ اللَّهُ فِي كِتَابِهِ فَهُوَ حَلَالٌ وَمَا حَرَّمَ فَهُوَ حَرَامٌ وَمَا سَكَتَ عَنْهُ فَهُوَ عَافِيَةٌ فَاقْبَلُوا مِنْ اللَّهِ الْعَافِيَةَ فَإِنَّ اللَّهَ لَمْ يَكُنْ نَسِيًّا ثُمَّ تَلَا هَذِهِ الْآيَةَ { وَمَا كَانَ رَبُّكَ نَسِيًّا } ).

Narrated Ja'far ibn Muhammad 'Alî Ash-Shiybânî that Ahmad ibn Hâzim Al-Ghefâriy that Abû Nu'iyim that 'Asîm ibn Rajâ' ibn Hiywah that his father that Abû ad-Dardâ' رضي الله عنه:

Allâh's Messenger صلى الله عليه وسلم said, "Whatever Allâh makes *Halâl* in His Book, it is *Halâl*, whatever Allâh makes *Harâm*, it is *Harâm*, and whatever Allâh stops talking about it, it is *Mubâh*. So, accept what Allâh makes permissible because Allâh forgets nothing; then, he recited the following *Âyah*: (... and your Lord is never forgetful.) [Surah19, Maryam, Âyah 64]."<sup>137</sup>

<sup>137</sup> It is *Sahîh* (authentic) Hadîth according to the criterion of Al-Bukhârî and Muslim but they did not report it. See "Talkhîs Al-Mustadrak 'alâ as-Sahîhiyyin," by adh-Dhahabî, chapter: Interpretation of the Holy Qur'ân, 3419.



حَدَّثَنَا عَبْدُ اللَّهِ بْنُ يَزِيدَ الْمُقَرِّي حَدَّثَنَا سَعِيدُ حَدَّثَنِي عَقِيلُ عَنْ ابْنِ شِهَابٍ عَنْ عَامِرِ بْنِ سَعْدِ بْنِ أَبِي وَقَّاصٍ عَنْ أَبِيهِ: أَنَّ النَّبِيَّ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ قَالَ: ( إِنَّ أَعْظَمَ الْمُسْلِمِينَ جُرْمًا مَنْ سَأَلَ عَنْ شَيْءٍ لَمْ يَحَرِّمْ فَحَرَّمَ مِنْ أَجْلِ مَسْأَلَتِهِ ).

Narrated ‘Abdullâh ibn Yazîd Al-Muqri’ that Sa’îd that ‘Aqîl that ibn Shihâb that ‘Amir ibn Sa’d ibn Abî Waqqâs that his father, Sa’d Ibn Abî Waqqâs رضى الله عنه: The Messenger of Allâh صلى الله عليه وسلم said, “The most sinful of Muslims is the one who asks about something that is not *Harâm*, but it has become *Harâm* because of his question.”<sup>138</sup>

This maxim is applicable on everything except the acts of worships. In principle, acts of worships are forbidden unless they are decreed by Allah.

### **An applicable examples for this Qâ‘idah**

- If a new form of food is discovered by man, the ruling is that that food is permissible to eat (halal).

<sup>138</sup> Sahîh Al-Bukhârî, chapter: Taking shelter by the Holy Qur’ân and the Sunnah, 6859.

## **Al-Qâ'idah no. 6**

الأصلُ في الأنظامِ التَّحرِيمُ

(*Al-asl fî al-abdâ' at-tahrîm*)

In principle, legal sexual intercourse is absolutely forbidden except legal ones

The *Asl*, here, refers to the basis that the *Ahkâm* and Fatwa are based on.<sup>139</sup> Having an intercourse with a woman is forbidden as *Al-Asl*, unless Allâh makes it *Halâl* to the needs of a man. It is *Halâl* by only two ways: marriage or the female slaves whom the Muslims' right hands possess.<sup>140</sup> So, if a man needs to marry a woman, but he does not know whether she is *Halâl* or *Harâm* for him, he has to stop and investigate thoroughly before he proceeds.<sup>141</sup>

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<sup>139</sup> Dr. **Bakr Ismâ'îl**, Al-Qawâ'id Al-Fiqhiyyah p.342.

<sup>140</sup> A person would have slaves through purchasing, *Hebah*, inheritance, bequeath, etc. Islâm found this system in the world, so it exploits every chance to free slaves like *Kaffarâh*, and urges the community to help slaves to get their freedom. Allâh orders the masters to treat slaves kindly and carry out their lawful needs, etc. That is Briefly understood from Al-Mawsû'ah Al-Fiqhiyyah Al-Kuwaitiyyah, Vol.23, pp.48-49

<sup>141</sup> **As-Seyûtî**, Al-Ashbâh Wan-Nazâ'ir, p.60.

### **Al-Qâ'idah no. 7**

لَا عِبْرَةَ بِالتَّوَهُّمِ

(*Lâ 'ibrah be at-tawahum*)

Rare and far imagination has no value in Sharî'ah

The *Ahkâm* of Sharî'ah cannot be verified relying on far and rare imaginations, and consequently if something is decisively and surely proven to be true, it overrules what is imaginative and indecisive.<sup>142</sup>

#### **An applicable example for this Qâ'idah**

- If creditors prove their debts by witnesses, they should get paid regardless of any remote or imaginable possibility that might refute their claim .<sup>143</sup>

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<sup>142</sup> Dr. An-Nadawî, Al-Qawâ'id Al-Fiqhiyyah p.416.

<sup>143</sup> Az-Zurqqâ, Sharh Al-Qawâ'id, p.363.

### **Al-Qâ'idah no. 8:**

لَا عِبْرَةَ بِالظَّنِّ الْبَيِّنِ خَطَاؤُهُ

(*Lâ 'ibrah be az-zunn al-baiyen khata'uh*)  
Assured mistaken conjecture has no value

Conjecture may be obvious or obscure false. If, however, it is plain wrong, no *Ahkâm Shar'iyyah* can rely on it.

### **An applicable examples for this Qâ'idah**

- If a person strongly thought that some people deserved Zakâh, however, there were evidence showing that he was mistaken, he should not give his Zakâh to them, since assured mistaken conjecture has no value.<sup>144</sup>

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<sup>144</sup> Dr. Bakr Ismâ'îl, Al-Qawâ'id Al-Fiqhiyyah, p.66.

### **Al-Qâ'idah no. 9:**

الْمُمْتَنِعُ مَادَّةٌ كَالْمُمْتَنِعِ حَقِيقَةً

(*Al-mumtani' 'âdah kal-mumtani' hâqîqah*)

An unfeasible widespread matter resembles a subjectively impossible matter

Things that are unlikely to happen are divided into two categories according to *Al-Usûliyîn* (الأصوليون, scholars who adopt texts) and *Al-Mutakalimûn* (المتكلمون, scholars who adopt views).

#### **First: impossible matters in reality:**

■ Like the impossibility of having more than one Creator to the universe.

#### **Second: impossible matters in 'Âdah** (عَادَةٌ, habit, routine, practice, and so on):

The majority of scholars agree that there is no *Taklîf* upon things which are unlikely to happen -in 'Âdah- such as flying to the heavens without a vehicle.

#### **An Exceptions:**

Abû Yusuf, the companion of Abû Hanîfah, excluded *Al-Aiymân* from this *Qâ'idah*. He stipulated that oaths are not deliberate except for the future im/possible things. So, if a person swears by Allâh that he will take somebody's life thinking that that person is alive but he was in fact dead, his oath is broken. Abû Yusuf did not differentiate between things that happen in 'Âdah and things that happen in fact. Swearing by Allâh to traditional imaginary things is not believed to be true, according to Abû Yusuf.<sup>145</sup>

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<sup>145</sup> Dr. Al-Bornû, *Al-Wajîz*, pp.214-215.

Deliberate oaths should be in something that will occur in the future, and they can be fulfilled or broken, otherwise they are not deliberate oaths, the majority of Hanafiyyah, Mâlik, Ash-Shâfi'iy and Ahmad observed.<sup>146</sup>

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<sup>146</sup> The previous source.

### **Al-Qâ'idah no. 10:**

لَا حُجَّةَ مَعَ الْاِئْتِمَالِ النَّاشِئِ عَنْ دَلِيلٍ

(*Lâ Hujjah ma'a al-ihtimâl an-nâshi'e 'ann dalîl*)

No argument with possibility arising based on evidence

In the book T'asîs an-Nazar the author says: "When a clear-cut accusation smears an action, the action will be unsound", according to Abû Hanîfah only, not his two companions or ash-Shâfi'î.<sup>147</sup>

### **An applicable examples for this Qâ'idah**

- If a person in his last illness confessed to his heirs that he owed some debts, his confession might not be owned, if there was an evidence of the possibility that he is planning on preventing his heirs from his inheritance.<sup>148</sup>

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<sup>147</sup> Abû Zaiyd Ad-Dabbûsiy, 'Ubiydullâh Ibn 'Umar, "T'asîs-un-Nazar," p.19, in Sharh Al-Qawâ'id, by Az-Zurqqâ, p.361.

<sup>148</sup> Al-Atâsî, Sharh Majalât Al-Ahkâm, pp.204-209.

## القَائِدَةُ الْكُلِّيَّةُ الْكُبْرَى الثَّالِثَةُ

### The Third *Qâ'idah Kulliyyah Kubrâ*

#### الْمَشَقَّةُ تَجْلِبُ التَّيْسِيرَ

(*Al-mashaqqah tajleb at-tiysîr*)

Hardship Begets Ease

Imâm Ash-Shâtibiyy stated that getting rid of hardship is proved true by numerous decisive evidence in Sharî'ah.<sup>149</sup> The *Qâ'idah* includes all *Rukhas* (رُخَصٌ, the plural of *Rukhsah*, رُخْصَةٌ).<sup>150</sup> *Rukhsah* is considered as an exceptional *Hukm* from preventive *Ahkâm*, and it is constricted by excuses confirmed by Sharî'ah, to lift human suffering.<sup>151</sup>

#### **Evidence:**

- **First: from the Qur'ân:**

Allâh says:

(...يُرِيدُ اللَّهُ بِكُمْ الْيُسْرَ وَلَا يُرِيدُ بِكُمْ الْعُسْرَ...)

(...Allâh intends for you ease, and He does not want make things difficult for you...)

(Sûrah 2. Al-Baqrah, Âyah 185)

(... لَا يُكَلِّفُ اللَّهُ نَفْسًا إِلَّا وُسْعَهَا...)

(Allâh burdens not a person beyond his scope....)

(Sûrah 2. Al-Baqrah, Âyah 286)

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<sup>149</sup> Abû Ishâq Ibn Mûsâ Al-Lakhmî **Ash-Shâtibiyy**, *Al-Muwafaqât fî Usûl Ash-Sharî'ah*, Vol.1, p.340. Verified by 'Abdullâh Drâz. Beirut, Lebanon: Dâr Al-Ma'rifah Press, Volume 4.

<sup>150</sup> Plural of *Rukhsah* i.e. concessionary law.

<sup>151</sup> 'Alî Hiydar, *Durar Al-Hukkâm*, Vol. 1, p.31, passage 17.



(... مَا يُرِيدُ اللَّهُ لِيَجْعَلَ عَلَيْكُمْ مِنْ حَرَجٍ ...)

(...Allâh does not want to place you in difficulty...)

(Sûrah 5. Al-Ma'idah, Âyah 6)

- **Second: from the Sunnah:**

حَدَّثَنَا مُحَمَّدُ بْنُ بَشَّارٍ قَالَ حَدَّثَنَا يَحْيَى بْنُ سَعِيدٍ قَالَ حَدَّثَنَا شُعْبَةُ قَالَ حَدَّثَنِي أَبُو  
الْتَّيَّاحِ عَنْ أَنَسٍ عَنِ النَّبِيِّ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ قَالَ: ( يَسِّرُوا وَلَا تُعَسِّرُوا وَبَشِّرُوا  
وَلَا تَنْفُرُوا ).

Narrated Muhammad ibn Bashâr that Yahyâ ibn Sa'îd that Shu'bah that Abû  
At-Teyâh that Anas (Ibn Mâlik) رضي الله عنه:

Allâh's Messenger صلى الله عليه وسلم said, "Facilitate things for people (concerning  
religious matters), and do not make it hard for them and give them good  
tidings and do not make them run away (from Islâm)." <sup>152</sup>

In another Hadîth

حَدَّثَنَا عَبْدُ اللَّهِ حَدَّثَنِي أَبِي ثَنَا مُحَمَّدُ بْنُ مُصْعَبٍ قَالَ ثَنَا الْأَوْزَاعِيُّ عَنْ الزُّهْرِيِّ عَنْ  
عُرْوَةَ عَنْ عَائِشَةَ قَالَتْ: مَا خَيْرَ رَسُولٍ اللَّهُ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ بَيْنَ أَمْرَيْنِ فِي  
الْإِسْلَامِ إِلَّا اخْتَارَ أَيْسَرَهُمَا.

Narrated 'Abdullâh that Muhammad ibn Mus'ab that Al-Awzâ'î that 'Urwah  
that 'Â'ishah, Mother of the Believers رضي الله عنهما said, "Whenever two matters  
were offered to the Prophet صلى الله عليه وسلم to choose between them, the Prophet  
صلى الله عليه وسلم would always choose the easiest one unless it was *Harâm*." <sup>153</sup>

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<sup>152</sup> Summarized Sahîh Al-Bukhârî Arabic-English, chapter: Knowledge, 63.

<sup>153</sup> It is *Sahîh* (authentic) Hadîth authenticated by Shu'ayb Al-Arna'ût. See Musnad Al-Imâm Ahmad Ibn Hanbal by  
Imâm **Ahmad** Ibn Hanbal, no. 24593. Although this *Isnâd* (The Chain of Transmission) is weak, Cairo, Egypt:  
Qurtubah Foundation Press, Volume 6.

## **Types of Hardship:**

### **1-Tolerable hardship:**

An example is having a headache (a degree of pain), or feeling hungry due to fasting (Sawm).

### **2-Intolerable hardship:**

If, for instance, a human can only find a dead animal to eat, he should eat the amount that keeps him alive. The extent of this situation is to protect one's life or one's organs from deterioration. One must consume only the amount that he needs.

### **3-Medium hardship:**

An example is whether to do the acts of Wudû' once or three times in a cold weather. It is when one has the choice to take *Rukhsah* or 'Azîmah.

Imâm Jalâlud-dîn As-Seyûtî restricted *Rukhsah* in eight reasons: travel, illness, coercion, forgetfulness, ignorance, hardship, a common hardship and deficiency of mentality.

**Rukhsah** is classified by scholars into:

1. ***Rukhsah*** that cancels a command of *Shâr'*, a man can cancel Jumu'ah Salâh, Hajj, *Jihâd* (جِهَاد)<sup>154</sup> due to valid excuses.
2. ***Rukhsah*** that reduces Salâh, like for a traveler, and so on.
3. ***Rukhsah*** that replaces a particular worship with another, like performing Tayammum instead of Wudû' due to the lack of water or due to a difficulty.

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<sup>154</sup> Fighting in the cause of Allâh or any other kind of effort to make Allâh's Word superior.

4. ***Rukhsah*** that delays doing something, like delaying the fasting of Ramadân to another time due to sickness or travel.
5. ***Rukhsah of Darûrah (necessity)***, eating a dead animal or pork to survive.
6. ***Rukhsah*** that changes a structure of Salâh due to fear.<sup>155</sup>

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<sup>155</sup> **As-Seyûtî**, Al-Ashbâh Wan-Nazâ'ir, p.82.

## القَوَائِدُ الْمُتَفَرِّعَةُ عَلَى الْقَاعِدَةِ الْكُلِّيَّةِ الْكُبْرَى الثَّالِثَةِ

*Qawâ'id Flow beneath the Third Qâ'idah Kulliyyah Kubrâ*

الْمَشَقَّةُ تَجْلِبُ التَّيْسِيرَ

(*Al-mashaqqah tajleb at-tiysîr*)  
Hardship Begets Ease

## Al-Qâ'idah no. 1&2:

إِذَا خَاقَ الْأَمْرُ اتَّسَعَ وَإِذَا اتَّسَعَ خَاقَ

(*Idhâ dâq al-amr itasa' wa idhâ itasa' dâq*)

When a matter tightens, it will widen and vice versa

The first part of the *Qâ'idah* means that whenever or wherever Muslims experience unexpected hardship preventing them from applying some Sharî'ah's commands, Sharî'ah's system simplifies this hardship. The second part of the *Qâ'idah* means that If a hardship ends, things should return to the ordinary state or *Hukm Al-Asl* (حُكْمُ الْأَصْلِ, the verdict of the origin).

### **Evidence:**

Allâh Ar-Rahmân (the Most Beneficent) says:

(وَإِذَا ضَرَبْتُمْ فِي الْأَرْضِ فَلَيْسَ عَلَيْكُمْ جُنَاحٌ أَنْ تَقْصُرُوا مِنَ الصَّلَاةِ إِنْ خِفْتُمْ أَنْ يَفْتِنَكُمُ الَّذِينَ كَفَرُوا إِنَّ الْكَافِرِينَ كَانُوا لَكُمْ عَدُوًّا مُبِينًا وَإِذَا كُنْتُمْ فِيهِمْ فَأَقَمْتَ لَهُمُ الصَّلَاةَ فَلْتَقُمْ طَائِفَةٌ مِنْهُمْ مَعَكَ وَلْيَأْخُذُوا أَسْلِحَتَهُمْ فَإِذَا سَجَدُوا فَلْيَكُونُوا مِنْ وَرَائِكُمْ وَلْتَأْتِ طَائِفَةٌ أُخْرَى لَمْ يُصَلُّوا فَلْيُصَلُّوا مَعَكَ وَلْيَأْخُذُوا حِذْرَهُمْ وَأَسْلِحَتَهُمْ وَدَّ الَّذِينَ كَفَرُوا لَوْ تَغْفُلُونَ عَنْ أَسْلِحَتِكُمْ وَأَمْتِعَتِكُمْ فَيَمِيلُونَ عَلَيْكُمْ مَيْلَةً وَاحِدَةً وَلَا جُنَاحَ عَلَيْكُمْ إِنْ كَانَ بِكُمْ أَدَى مِنْ مَطَرٍ أَوْ كُنْتُمْ مَرْضَى أَنْ تَضَعُوا أَسْلِحَتَكُمْ وَخُذُوا حِذْرَكُمْ إِنَّ اللَّهَ أَعَدَّ لِلْكَافِرِينَ عَذَابًا مُهِينًا فَإِذَا قَضَيْتُمُ الصَّلَاةَ فَادْكُرُوا اللَّهَ قِيَامًا وَقُعُودًا وَعَلَى جُنُوبِكُمْ فَإِذَا اطْمَأْنَنْتُمْ فَأَقِيمُوا الصَّلَاةَ إِنَّ الصَّلَاةَ كَانَتْ عَلَى الْمُؤْمِنِينَ كِتَابًا مَوْقُوتًا )

(And when you (Muslims) travel in the land, there is no sin on you if you shorten your prayer if you fear that the disbelievers may attack you, verily, the disbelievers are ever unto you open enemies.(101) When you (O Messenger Muhammad) are among them, and lead them in prayer, let one party of them stand up (in prayer) with you taking their arms with them; when they finish

their prostrations, let them take their positions in the rear and let the other party come up which has not pray with you taking all the precautions and bearing arms. Those who disbelieve wish, if you were negligent of your arms and your baggage, to attack you in a single rush, but there is no sin on you if you put away your arms as a result of the inconvenience of rain or because you are ill, but take every precaution for yourselves. Verily, Allâh has prepared a humiliating torment for the disbelievers.(102) When you have finished the (congregational) prayer, remember Allâh standing, sitting down, and lying down on your sides, but when you are free from danger, offer prayers perfectly (إِقَامَةُ الصَّلَاةِ, *Iqâmat-as-Salâh*). Verily, the prayer is enjoined on the believers at fixed hours.( 102 )

(Sûrah 4. An-Nisâ', Âyâh 101-103)

### **Examples:**

- When a debtor is poor, it is encouraged that he is given a period of time wherein he can repay the money - even in installments.
- Should a human have nothing to eat, he can eat a dead animal or make use of some others' property in order to survive, but he ought to return what he took when he can.
- While on board, passengers can offer Salâh even if they do not know where the *Qiblah* is or they are not able to stand up.<sup>156</sup>

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<sup>156</sup> Dr. Al-Qahtâniy, Manhaj Istînbât Ahkâm An-Nawâzil, p.950.

### Al-Qâ'idah no. 3:

الضَّرُورَاتُ تُبَيِّحُ الْمَنْظُورَاتِ

(*Ad-darurât tubîh al-mahzurât*)

Necessity renders prohibited matters permissible

What is legally forbidden becomes legitimate due to dire need or *Darûrah* (necessity).

#### Evidence:

Allâh says:

(... وَقَدْ فَصَّلَ لَكُمْ مَا حَرَّمَ عَلَيْكُمْ إِلَّا مَا اضْطُرَرْتُمْ إِلَيْهِ ...)

(...While He has explained to you in detail what is forbidden to you, except under compulsion of necessity?)

(Sûrah 6. Al-An'âm, Âyah 119)

In another place, Allâh Al-Ghafûr (الْغَفُورُ, The Oft-Forgiving) says:

(... فَمَنْ اضْطُرَّ غَيْرَ بَاغٍ وَلَا عَادٍ فَلَا إِثْمَ عَلَيْهِ ...)

(But if one is forced by necessity without willful disobedience nor transgressing due limits; then, there is no sin on him...)

(Sûrah Al-Baqrah, Âyah 173)

Allâh Al-'Afuww (الْعَفُوفُ, the Oft-Pardoning), says:

(مَنْ كَفَرَ بِاللَّهِ مِنْ بَعْدِ إِيمَانِهِ إِلَّا مَنْ أَكْرَهَ وَقَلْبُهُ مُطْمَئِنٌّ بِالْإِيمَانِ وَلَكِنْ مَنْ شَرَحَ بِالْكُفْرِ صَدْرًا فَعَلَيْهِمْ غَضَبٌ مِنَ اللَّهِ وَلَهُمْ عَذَابٌ عَظِيمٌ)

(Whoever disbelieved in Allâh after his belief, except him who is forced thereto and whose heart is at rest with Faith - but such as open their breasts to disbelief, - on them is wrath from Allâh, and theirs will be a great torment.)

(Sûrah 16. An-Nahl, Âyah 106)

Moreover, there is *Qâ'idah* that perfects this *Qâ'idah*:

”مَا جَازَ لِضَرُورَةٍ يُقَدَّرُ بِقَدْرِهَا”

(*Mâ jâz le darûrah yuqadar be qadarihâ*) What is permissible due to necessity is restricted by it and should not transgress it.”

Perhaps it was extracted from what Allâh says:

(... فَمَنْ اضْطُرَّ غَيْرَ بَاغٍ وَلَا عَادٍ فَلَا إِثْمَ عَلَيْهِ ...)

(... But if one is forced by necessity without willful disobedience nor transgressing due limits; then, there is no sin on him...)

(Sûrah 2. Al-Baqrah, Âyah 173)

### **The conditions of *Darûrah* (ضُرُورَةٌ, necessity) are:**

It must be real, truthful and not fabricated, and it can actually remove the difficulty in hand. Thus, for instance, if one has the choice either to spend some years in jail for indebtedness or to take *Ribâ* (money to pay his debt), he can take the *Ribâ*. That is because if he refuses to take *Ribâ*, he will be imprisoned, mingling with criminals, and his family's affairs will deteriorate, and so on.

حَدَّثَنَا أَحْمَدُ بْنُ الْمُقْدَامِ حَدَّثَنَا خَالِدٌ حَدَّثَنَا سَعِيدٌ عَنْ قَتَادَةَ أَنَّ أَنَسًا حَدَّثَهُمْ: أَنَّ النَّبِيَّ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ رَخَّصَ لِعَبْدِ الرَّحْمَنِ بْنِ عَوْفٍ وَالزُّبَيْرِ فِي قَمِيصٍ مِنْ حَرِيرٍ مِنْ حَكَّةٍ كَانَتْ بِهِمَا.

Narrated Ahmad ibn Al-Miqdâm that Khâlid that Sa'id that Qatâdah that Anas

رضي الله عنه:

Allâh's Messenger صلى الله عليه وسلم gave permission to Az-Zubair and 'Abdur-Rahmân Ibn 'Awf رضي الله عنهما to wear silk clothes owing to skin irritation.<sup>157</sup>

### **Three levels of *Darûrah* are involved in this *Qâ'idah*:**

#### **1- *Darûrah that makes the illegitimate, legitimate:***

Like when someone fears death because of starvation, he must eat anything that he can find, even if it were a dead animal or Pig meat.

<sup>157</sup> Sahîh Al-Bukhârî, chapter: Wearing silk clothes in war, 2762, Sahîh Muslim, chapter: Wearing silk clothes for who is afflicted by itching, 5550, and Ibn 'Uthiymin, Al-Qawâ'id Al-Fiqhiyyah, p.26.



2- **Dârurah as a consequence. It does not legitimize the illegitimate.**

Like If someone was forced to utter blasphemy or words of disbelief, he can say them providing that his heart is full of faith. In this example, the doer is not sinful, but the description of the act is still *Harâm*. In this type of *Darûrah* or *Rukhsah*, should a person refuse what he is enforced to do, it might be better for him.

3- **Darûrah that does not legitimize what is illegitimate.**

Such as killing a sinless or Infallible blood person, dealing with parents forcefully or violently, committing *Zinâ* (زِنَا, adultery, fornication), and so on. In this type of *Darûrah*, what is done is *Harâm*, and the doer is sinful and must recompense the victim. However, *Al-Hudûd* (الْحُدُودُ)<sup>158</sup> are avoided by *Ash-Shubuhât* (شُبُهَات, suspicions). It is recorded that *Tarkhîs* (تَرْخِيس, concession) removes sin but cannot remove *Tahrîm*.

**Examples:**

- It is permissible for a creditor to secretly take all or some of his money from a debtor who wrongly declines to repay the money.
- It is permissible to defend and kill an enemy who cannot be subdued except by killing him.
- *Al-Muhrim* can kill wild animals defending himself.<sup>159</sup>
- Out of necessity, one can drink wine or urine (if there is no water) to swallow food.<sup>160</sup>

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<sup>158</sup> Fixed punishments by *Shari'ah*.

<sup>159</sup> 'Alâ'ud-Dîn Abû al-Hasan 'Alî ibn Suliymân **Al-Mardâwî al-Hanbaliy** (d.885/1480) *At-Tahbîr Sharh at-Tahrîr fî Usûl Al-Fiqh*, Vol.8, p.3847, verified by Dr. 'Abdur-Rahmân Al-Jibrîn and others. Saudi Arabia: Riyadh, Ar-Rusd Press, Volume 8, 1421/2000.

<sup>160</sup> The previous source and the same page.

### Al-Oâ'idah no. 4:

الضَّرُورَةُ بِقَدَرِهَا . مَا أُبِيحَ لِضَّرُورَةٍ يُقَدَّرُ بِقَدَرِهَا

(*Ad-dârurah tuqadar be qadariha or mâ ubîh le dârurah yuqadar be qadarihâ*)

Necessities have limits that should not be exceeded

*Darûrah* (ضَرُورَةٌ, necessity) that is blockaded by sieges should not exploit *Rukhsah*. The *Dâbit* (ضَابِطٌ, the controller), here, that limits the *Darûrah* is a dangerous matter or severe hardship that human beings cannot endure.<sup>161</sup>

### Evidence:

Allâh ays:

(... فَمَنْ اضْطُرَّ غَيْرَ بَاغٍ وَلَا عَادٍ فَلَا إِثْمَ عَلَيْهِ ...)

(... But if one is forced by necessity without willful disobedience nor transgressing due limits; then, there is no sin on him...)

(Sûrah 2. Al-Baqrah, Âyah 173)

Should *Rukhsah* be restricted by a definite time, a man cannot go beyond that time.

### Examples:

- Suppose a person, in order to save his life, was forced to eat a dead animal, he is no allowed to consume more than he actually needs to survive.
- A doctor should not look at the private parts of a man's body except what is necessary.
- If someone is starving, and another person, who has more than his immediate needs, refuses to provide the starving person with food, the

<sup>161</sup> ‘Abdur-Rahmân As-Sa’dî, *Risâlah Latîfah wa Jâmi’ah men Usûl Al-Fiqh Al-Muhemmah*, p. 103. Beirut, Lebanon: Dâr Ibn Hazm Press, 1412/1992.

hungry person has the right to take it by force, and to recompense him later.

### **Al-Oâ'idah no. 5:**

مَا جَازَ لِعُذْرٍ بَطَلَ بِرَوَالِهِ

(*Mâ jâz le 'udhr batal be zawâlih*)

Should something become legal by a valid excuse, it becomes illegal when the excuse ends

If something (Y) has become lawful by an accepted excuse (X), Y is going to become unlawful when X ends. "Unlawful" here equals nonexistent since when X is absent, Y must stop.<sup>162</sup>

#### **Examples:**

- In the event of making Tayammum instead of Wudû', because there is no water, a man will make Wudû' when he finds water.
- Returning to his country, a traveler should not make *Qasr* (قَصْرُ, shorten) Salâh.
- A widow in her *'Iddah* should stay in her house until the *'Iddah* ends except if she needs to work to get money. However, if she finds money, she has no right to look for work or to work within this period of time.

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<sup>162</sup> Dr. Al-Bornû, Al-Wajîz, p.241.

### **Al-Qâ'idah no. 6:**

الْحَاجَةُ تَنْزِلُ مَنْزِلَةَ الضَّرُورَةِ عَامَّةً كَانَتْ أَوْ خَاصَّةً

(*Al-hâjah tanzil manzil ad-dârurah 'âmmah aw khâssah*)  
General/Particular need, can develop into necessity

*Hâjah* (حَاجَةٌ, need) is lesser than *Darûrah* (ضَرُورَةٌ, necessity) and Sharî'ah divides man's needs into three categories:

#### **1- Darûrah:**

It is Circumstances where one or more of the five objectives of Sharia is violated, (protection of faith, life, intellect, honor, and wealth).

#### **2- Hâjah:**

It is Circumstances where one or more of the five objectives of Sharia may be violated.

#### **3- Kamâliyât (كَمَالِيَّاتُ) <sup>163</sup>:**

It is extra comodities that are neither necessary nor needed (luxurios comodities).

#### **Note**

When a **general Hâjah** befalls someone or a group of people, it becomes a *Darûrah* that needs to be removed by *Rukhsah* for all people. *Hâjah* turns to *Darûrah* not for one person only but for all people, members of a particular occupation or citizens of a certain country. A forbidden matter becomes allowable by *Darûrah*, and it ends when the *Darûrah* ends, and human/s can benefit from it. Matters that are used as a pretext for committing *Harâm* become *Harâm*; however, *Darûrah* renders them *Halâl*.<sup>164</sup>

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<sup>163</sup> Luxuries, articles of luxury; nonessentials, and so on.

<sup>164</sup> The previous source, p.26.

“When people are afflicted by a particular hardship which can destroy their life, they take exactly what they need even if it is *Haram*,” Ghiyâthî, Imâm Al-Haramain (d.478/1085) stated. The group of scholars who advocates this trend and his leader Al-Juwiynî Imâm Al-Haramain said, “When there is no way for people except to take or commit *Haram*, **three provisos must be adhered to:**

- i. *Hâjah* must be true, not unreal. *Hâjah* here means removing a certain hardship people are suffering from.
- ii. When there is no escape except taking or committing *Haram*.
- iii. People must only take what they really and precisely need since there is no room (in that case) to live in comfort and luxury.<sup>165</sup>

### **Examples:**

- *Al-Ijârah* (الإيجَارَةُ),<sup>166</sup> *Al-Ji'âlah* (الجَعَالَةُ),<sup>167</sup> *Al-Hiwâlah* (الْحَوَالَةُ)<sup>168</sup> and *As-Salam* (السَّلَامُ)<sup>169</sup> are not analogous to Sharî'ah, but they are legalized owing to the public *Hâjah* of people. Although one has not to sell non-existent objects, *Al-Ijârah* and *As-Salam* are exceptions to this principle because of the *Hâjah* of people. *Al-Ji'âlah* includes ignorance of its affairs, and *Al-Hiwâlah* is to trade a debt with another debt and that is null and void, but they are allowed thanks to the public *Hâjah* of people.
- Because of people's need, it is permissible to appoint a broker and to pay for him such and such a sum of money although *Al-Qiyâs* disallows

<sup>165</sup> Ahmad **Al-Kâfi**, *Al-Hâjah Ash-Shar'îyyah Hudûduhâ wa Qawâ'iduhâ*, pp.115-117. Beirut, Lebanon: Dârul Kutub Al-'Ilmiyyah Press, 1<sup>st</sup>. ed., 1424/2003.

<sup>166</sup> The use and enjoyment of property for a time, includes hire, rental, and lease.

<sup>167</sup> A reward given to a person for doing something.

<sup>168</sup> The transference of a debt from one person to another. It is an agreement whereby a debtor is released from a debt by another becoming responsible for it.

<sup>169</sup> The synonym of *salaf* means a sale in which the price is paid at once for goods to be delivered later.

that deal and dictates that the broker should take the wage of the like of him.<sup>170</sup>

- Out of necessity, Sharī'ah allows the witness or the judge to look at a woman's face, even if he certainly knows that this matter causes him a very strong sexual desire.<sup>171</sup>

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<sup>170</sup> **Az-Zurqqâ**, Sharh Al-Qawâ'id, p.211.

<sup>171</sup> 'Alâ'ud-Dîn **Al-Kasâniy** (d.587/1191), Badâ'i' as-Sanâ'i' fî Tartîb ash-Sharâ'i', Vol.5, P.122, Beirut: Dâr al-Kitâb Al-'arabiy, 1982, Volume 7.

### Al-Qâ'idah no. 7:

الاضْطِرَارُّ لَا يُبْطِلُ حَقَّ الْغَيْرِ

(*Al-ibtirâr lâ yubtil haqq al-ghair*)

People's rights are not devoured because of necessity

This Qâ'idah limits Qâ'idah: "الضَّرُورَاتُ تُبَيِّحُ الْمَحْظُورَاتِ"

**(Ad-darûrât tubih al-mahzurât) Necessity knows no law**", namely whether a matter is *Darûrah* or *Hâjah*, man ought not to seize others' rights. In addition, it is not permissible to remove detriment by drawing another detriment. Therefore, if starving, a person is obliged to consume others' food yet he is obligated to repay the value of the food to the owner when starvation is removed. If a person has been brutally forced and threatened to commit *Harâm*, the one who commanded him will be the oppressor who will be held accountable for the act and who must compensate the victims. When a person is forced to take somebody's life, he should not do it. However, if he did, he and the one who commanded him will both be responsible for the crime. It is believed that coercion is not a valid excuse for committing murder.<sup>172</sup>

#### Examples:

- When someone on board a means of transportation throws others' baggage in the ocean to reduce the load, he has to make up to those people for the damage.
- When somebody slays a camel defending himself, he does not reimburse its owner, according to Shâfi'iyyah and Hanabelah.<sup>173</sup> However, he should make up for it to its owner as people's rights are not devoured

<sup>172</sup> Dr. d Al-Bornû, Al-Wajîz, p.244.

<sup>173</sup> Al-Atâsî, Sharh Majalat Al-Ahkâm, Vol. 1, p.76.



owing to necessity, unless it is commonly known as a wild animal and his owner does not keep it back from attacking people, Hanafiyyah observe.<sup>174</sup> Hanafiyyah believe that *Al-Ibâhah* (الإباحة, permission) does not thwart the guarantee.<sup>175</sup>

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<sup>174</sup> Dr. **Al-Bornû**, Al-Wajîz, pp.244-245.

<sup>175</sup> Muhammad Amîn ibn ‘Umar ibn ‘Abel-‘Azîz ad-Dimeshiy **Ibn ‘Abdîn**, a great scholar of Hanafiyyh (d.1836/1252), Hâshiyat Radd Al-Mukhtâr ‘Alâ Addurr Al-Mukhtâr Sharh Tanwîr Al-Absâr Fiqh Abî Hânifâh Vol.6, p. 663. Beirut, Lebanon: Dâr Al-Fikr Press, Volume 8,1421/2000.

### **Al-Qâ'idah no. 8:**

إِذَا تَعَذَّرَ الْأَمْلُ يُصَارُ إِلَى الْبَدَلِ

(*Idha ta 'adhar al-asl yusâr ilâ al-badal*)

When *Al-Asl* (that must be first) is not available, we proceed to *Al-Badal* (alternative)

First, we need to talk about categories of *Al-Adâ'* (الأداء), which is fulfilled immediately) and *Al-Qadâ'* (القضاء), which is fulfilled later).

#### **Kinds of Al-Adâ':**

1. **Complete Adâ'** like one who offers Salâh at its time in congregation.
2. **Partial Adâ'** like one who offers Salâh alone.
3. **Adâ' that looks like Al-Qadâ'**, for instance, a person came later to offer congregational Salâh, so he performs what he has missed; this is called *Qadâ'* and in the same time it is named *Adâ'* since he has performed Salâh with the Imâm.<sup>176</sup>

#### **Kinds of Al-Qadâ':**

1. **Complete Qadâ'**, when, for example, somebody steals something and devours it fully, he must repay its value or its like.
2. **Incomplete Qadâ'**, when, for instance, a person takes something that does not have a counterpart, but it can be valued, he must pay its cost.<sup>177</sup>

The *Qâ'idah* says that if one cannot do '*Azîmah*, he should resort to *Rukhsah* called *Badal* (بَدَل, an alternative).

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<sup>176</sup> Al-Mawsû'ah Al-Fiqhiyyah Al-Kuwaitiyyah, Vol.2, p.327.

<sup>177</sup> Dr. Al-Bornû, *Al-Wajîz*, p.248.

## **This Badal is divided into three types:**

### **1-a Badal that exist but only in the future and after the time ends:**

Imagine the time of Salâh is about to end and there is no water (but it will possibly appear after the time of Salâh terminates), a man would make Tayammum.

### **2-a Badal which is not limited by time:**

A Muslim will not leave *Kaffârah*<sup>178</sup> and avail himself of *Badal* if he has the ability to do *Kaffârah* since these sorts of *Kaffârât* (كَفَّارَاتُ, plural of *Kaffârah* كَفَّارَةٌ, expiation) are not constrained by time. Even if he dies, his heirs on his behalf can do *Kaffârah* from his property.

### **3- a Badal is equivalent to the two previous kinds of Badal:**

For expiation of *Zihâr* (زِهَارُ)<sup>179</sup>, for instance, a man can do penance later since it is not controlled by a definite time, as the majority of scholars state<sup>180</sup>, or he can turn to *Badal* (fulfilling the *Kaffârah*) if that postponement wrongs him.<sup>181</sup>

## **Evidence:**

Allâh the One Who loves those who make themselves clean and pure says:

(...وَإِنْ كُنْتُمْ مَّرْضَىٰ أَوْ عَلَىٰ سَفَرٍ أَوْ جَاءَ أَحَدٌ مِّنْكُم مِّنَ الْغَائِطِ أَوْ لَامَسْتُمُ النِّسَاءَ فَلَمْ تَجِدُوا مَاءً فَتَيَمَّمُوا صَعِيدًا طَيِّبًا فَامْسَحُوا بِوُجُوهِكُمْ وَأَيْدِيكُمْ...)

(...And if you are ill, or on a journey, or one of you comes after answering the call of nature, or you have been in contact with women (be sexual relations)

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<sup>178</sup> Certain punishment upon the people who committed sins. Some kinds of *Kaffârah* are: Fasting, feeding the poor and freeing a slave.

<sup>179</sup> Signifies the likening of a woman to a within the prohibited degrees. The usual formula is: "You are to me as my mother's back." Before Islam, *Zihâr* stood as a divorce, but Islam changed it to a temporary prohibition, for which expiation must be performed, viz. either freeing a slave, or two months' fast, or feeding sixty persons. See *Dictionary of Islamic Terms, Arabic-English* by Deeb Al-Khudarawi.

<sup>180</sup> Some, however, stated that he is sinful when he delays doing of *kaffârah* of az-*Zihâr* till the end of his life. See *Al-Mawsû'ah Al-Fiqhiyyah Al-Kuwaitiyyah*, Vol.10, pp. 14-15

<sup>181</sup> Dr. **Al-Bornû**, *Al-Wajîz*, p.248-249.

and you find no water, then perform Tayammum with clean earth and rub therewith your faces and hands (Tayammum)...)

(Sûrah 4. An-Nisâ', Âyah 43)

In another position, Allâh the Most Beneficent says:

(... فَإِذَا أَمِنْتُمْ فَمَنْ تَمَتَّعَ بِالْعُمْرَةِ إِلَى الْحَجِّ فَمَا اسْتَيْسَرَ مِنَ الْهَدْيِ فَمَنْ لَمْ يَجِدْ فَصِيَّامٌ ثَلَاثَةِ أَيَّامٍ فِي الْحَجِّ وَسَبْعَةٍ إِذَا رَجَعْتُمْ تِلْكَ عَشْرَةٌ كَامِلَةٌ ...)

(...Then if you are in safety and whosoever performs the 'Umrâh in the months of Hajj, before (performing) the Hajj (i.e. *Hajj-at-Tamattu'* and *Al-Qirân* (حَجُّ التَّمَتُّعِ وَالْقِرَانِ), he must slaughter a *Hady* (الْهَدْيُ) animal, i.e. a sheep, a cow or a camel, etc.) such as he can afford, but if he cannot afford it, he should fast three days during the Hajj and seven days after his return (to his home), making ten days in all...)

(Sûrah 2. Al-Baqarah, Âyah 196)

### **Examples:**

- In the event of argument between a couple of suitors and the guardian of a woman, they will adhere to the *Mahr* (مَهْرُ, dower) of her counterparts.
- If the spouses differ in the dowry and none of them has *Bayyinah* (بَيِّنَةٌ), the dowry of the like of women should be there.
- Concerning *Al-Waqf* (الْوَقْفُ, endowment), if there is no *Bayyinah*, we ought to return to treatment of the persons who were responsible for *Al-Waqf* in the past.

## القَائِدَةُ الْكُلِّيَّةُ الْكُبْرَى الرَّابِعَةُ

### The Fourth *Qâ'idah Kulliyah Kubrâ*

لَا ضَرَرَ وَلَا ضِرَارَ أَوْ الضَّرْرُ يُزَالُ

(*Lâ darar wa lâ dirâr*)<sup>182</sup>

Or (*Ad-darar yuzal*)

There is to be no harm, and no reciprocating harm, or harm must be eliminated

This *Qâ'idah* states that a human must not hurt others (creating ضَرَرٌ, *Darar*), and others should not reply too (producing ضِرَارٌ, *Dirâr*), Imâm Ibn Al-Athîr (d.606/1209) observed<sup>183</sup>. In addition, it shows how Islâm encourages people's security, spreads peace by dismissing evil from their life and forbids detriment among them. Several chapters of *Fiqh* are based on this *Qâ'idah* such as: *Al-Khayarât* (خَيَارَاتُ),<sup>184</sup> *Al-Hajr, ash-Shuf'ah* (الشُّفْعَةُ),<sup>185</sup> *Al-Qisâs*

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<sup>182</sup> It is *Sahih le ghaireh* (i.e. Hadîth Hasan comes from more than one narrator) *Sunan Ibn Mâjah*, on the authority of Ibn 'Abbaas رَضِيَ اللَّهُ عَنْهُمَا chapter: Judgments; Hadîth No. 2341. Verified by Muhammad Fu'âd 'Abdul-Bâqî and authenticated by Al-Albâniy. Beirut, Lebanon: Dâr Al-Fikr Press. Volume 2.

<sup>183</sup> Abû As-Sa'adât Al-Mubârik ibn Muhammad Al-Jazarî **Ibn Al-Âthîr**, *An-Nihâyah fî Gharîb Al-Hadîth wal-Athar*, Vol.3, p. 81. Verified by Tâhir Ahmad Az-Zâwî and Mahmûd Muhammad at-Tanâhî. Beirut, Lebanon: Al-'Ilmiyyah Press, 5<sup>st</sup>. ed., 1399/1979.

<sup>184</sup> All sorts of options of contracts.

<sup>185</sup> "Adjunction". The right of pre-emption is a power of possessing property that is for sale. It applies not to movable property but to immovable property (عَقَارٌ 'aqâr). This right of pre-emption appertains in the first place to the co-sharer or partner in the property; secondly, to a sharer in the immunities and appendages of the property such as the right to water, or to roads; and thirdly, to the neighbor. See *Dictionary of Islamic Terms, Arabic-English* by Deeb Al-Khudarawi.

(الْقِصَاصُ),<sup>186</sup> *Al-Hudûd, Al-Kaffârât*, guarantee of damages, division of common property, appointing of leaders, *Ahkâm*, and so on. Causing difficulties is *Harâm* counting on the evidence of this *Qâ'idah* in the coming pages. Although applying *Hadd* (الْحَدُّ, penalty) generates *Darar*, it is not *Harâm* as Allâh prescribes it so that people can survive in peace.

If a human wishes to injure someone for no reason, this is completely *Harâm*. Commonly, to act freely in ownership, there two statements are: a person deals conclusively with his possession since it is his pure right, according to Abû Hanîfah, Ash-Shafi'î and others. A person has no right to proceed independently in his ownership like a man who builds a high building depriving his neighbour from sun and air, etc., according to Mâlik (in some cases), Ahmad and others.<sup>187</sup>

## **Evidence:**

### **• First, from the Qur'ân:**

Allâh the One Who comprehends all things in mercy and knowledge says:

(... لَا تُضَارَّ وَالِدَةٌ بِوَلَدِهَا وَلَا مَوْلُودٌ لَهُ بِوَلَدِهِ ...)

(...No mother shall be treated unfairly on account of her child, nor father on account of his child...)

(Sûrah 2. Al-Baqrah, Âyah 233)

Allâh the One to Whom is the final return says:

(... الطَّلَاقُ مَرَّتَانٍ فَإِمْسَاكَ بِمَعْرُوفٍ أَوْ تَسْرِيحٌ بِإِحْسَانٍ ...)

(The divorce is twice, after that, either you retain her on reasonable terms or release her with kindness...)

(Sûrah 2. Al-Baqrah, Âyah 229)

Allâh the All-Knower of everything says:

<sup>186</sup> (Retaliation) is that punishment which, although fixed by the law, can be remitted by the person offended against, or, in the case of murdered person, by his heirs. Moreover, *arsh* means estimated compensation to be given to injured person by another person.

<sup>187</sup> Zainud-dîn 'Abdur-Rahmân ibn Ahmad al-Hanbaliy **Ibn Rajab** (d. 1393/795), *Jâmi' Al-'Ulûm wal-Hikam fî Sharh Khamsîn Hadîth men Jawâmi' al-Kalim*, Vol.3, p.921. Verified by Dr. Muhammad Al-Ahmadî Abû An-Nûr. Dâr as-Salâm press., Volume 3, 2<sup>nd</sup>. ed. 2004/1424.

(...) وَإِذَا طَلَقْتُمُ النِّسَاءَ فَلْيُغْنِ أَجَلُهُنَّ فَأَمْسِكُوهُنَّ بِمَعْرُوفٍ أَوْ سَرِّحُوهُنَّ بِمَعْرُوفٍ وَلَا تُمْسِكُوهُنَّ ضِرَارًا لِّتَعْتَدُوا (...)

(And when you have divorced women and they have fulfilled the term of their prescribed period, either take them back on reasonable basis or set them free on reasonable basis. But do not take them back to hurt them...)

(Sûrah 2. Al-Baqrah, Âyah 231)

### • **Second, from the Sunnah:**

حَدَّثَنَا أَبُو الْعَبَّاسِ مُحَمَّدُ بْنُ يَعْقُوبَ ثَنَا الْعَبَّاسُ بْنُ مُحَمَّدٍ الدَّوْرِي ثَنَا عُثْمَانُ بْنُ مُحَمَّدٍ ثَنَا عُثْمَانُ بْنُ رَبِيعَةَ بْنِ أَبِي عَبْدِ الرَّحْمَنِ ثَنَا عَبْدُ الْعَزِيزِ بْنُ مُحَمَّدٍ الدَّرَاوَرْدِيُّ عَنْ عَمْرُو بْنِ يَحْيَى الْمَازِنِيِّ عَنْ أَبِيهِ عَنْ أَبِي سَعِيدٍ الْخُدْرِيِّ رَضِيَ اللَّهُ عَنْهُ : أَنَّ رَسُولَ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ قَالَ: (لَا ضَرَرَ وَلَا ضِرَارَ مَنْ ضَارَ ضَارَهُ اللَّهُ وَمَنْ شَاقَّ شَاقَّ اللَّهُ عَلَيْهِ).

Narrated Abû Al-'Abbâs Muhammad ibn Ya'qûb that Al-'Abbâs ibn Muhammad Ad-Duwâri that 'Uthmân ibn Muhammad ibn 'Uthmân ibn Rabî'ah ibn Abî 'Abdur-Rahmân ibn 'Abdul-Azîz ibn Muhammad ad-Durawradî that 'Umar ibn Yahyâ al-Mâznî that his father that Abû Sa'îd Al-Khudrî رضي الله عنه:

Allâh's Messenger صلى الله عليه وسلم said, "*Lâ Darar wa lâ Dirâr* (do not injure others and others should not reciprocate), and whosoever hurts others, Allâh hurts him, and whosoever places others under difficulties, Allâh places him under difficulties."<sup>188</sup>

Moreover, Samurah Ibn Jundab رضي الله عنه narrated that a man had a tree in another person's orchard and the tree's owner incurred a continuous pain because he constantly entered the orchard. The orchard's owner complained to the Prophet of Allâh صلى الله عليه وسلم who commanded the tree's owner to take an alternative to it or leave it for charity, but he vetoed. Therefore, Allâh's Messenger صلى الله عليه وسلم ordained the owner of the orchard to remove that tree, and said to the tree's owner, "You are nothing except harmful."<sup>189</sup>

<sup>188</sup> It is *Sahîh* Hadîth on the criterion of Imâm Muslim, but he did not report it. See "Talkhîs Al-Mustadrak 'alâ As-Sahîhiyyin," by adh-Dhahabî, chapter: Bargains no. 2345.

<sup>189</sup> It is *Dâ'îf* (weak) Hadîth. See *Sunan Abî Dâwûd*, no. 3636.

### **Examples:**

- When the period of a lease expires before harvest, the lessee can stay until he harvests his plants because collecting crops before their exact time damages them; however, he should pay an extra rental fee for the additional period he stays.
- There is no harm if the government incarcerates those who are well known for prostitution and corruption to guard the community, in case it cannot legally prove their corruption.<sup>190</sup>

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<sup>190</sup> Dr. **Az-Zurqqâ**, Al-Madkhal, Vol. 2, pp.966-967, chapter 81, passage 20-29.



## القَوَائِدُ الْمُتَفَرِّعَةُ عَلَى الْقَاعِدَةِ الْكُلِّيَّةِ الْكُبْرَى الرَّابِعَةُ

*Qawâ'id come under the fourth Qâ'idah Kulliyyah Kubrâ*

لَا ضَرَرَ وَلَا ضِرَارَ

*(Lâ darar wa lâ dirâr)*

There is to be no harm and no reciprocating harm

### **Al-Qâ'idah no. 1:**

الضَّرَرُ يُدْفَعُ بِهَدَرِ الْإِمْكَانِ

(*Ad-darar yudfa' be qadr al-imkân*)

Harm should be avoided as much as possible

Before undergoing hardship, detriment must be averted by all available means without incurring harm as much as possible, according to the *Masâlih Mursalah* (مَصَالِحُ مُرْسَلَةٌ).<sup>191</sup>

#### **Evidence:**

Allâh Al-'Azîz (الْعَزِيزُ, the All-Mighty) says:

وَأَعِدُّوا لَهُمْ مَا اسْتَطَعْتُمْ مِنْ قُوَّةٍ وَمِنْ رِبَاطِ الْخَيْلِ تُرْهِبُونَ بِهِ عَدُوَّ اللَّهِ وَعَدُوَّكُمْ ...

(And Make ready against them all you can of power, including steeds of war (tanks, planes, missiles, artillery, etc.) to threaten the enemy of Allâh and your enemy...)

(Sûrah 8. Al-Anfâl, Âyah 60)

#### **Examples:**

##### **Interests for the community:**

- *Al-Jihâd* is legalized by Sharî'ah to avoid the enemies' evils, and *Hudûd* and *Ta'zîr*<sup>192</sup> are legally recognized to avert crime and tighten security against it.
- Should all the money in the world become *Harâm* because of unlawful dealings and extorted property that was mingled with one another, rich and poor people are given what is sufficient for them all. However, if

<sup>191</sup> The previous source, Vol. 2, pp.993-1000, chapter 81, passage 20-29.

<sup>192</sup> Discretionary punishments.

they have been provided with what is barely sufficient, the entire world would gradually be obliterated.<sup>193</sup>

**Interests for private rights:**

- *Ash-Shuf'ah* is sanctioned to forestall unanticipated troubles from a new neighbor.
- *Hajr* is officially authorized to preclude damage that may be generated from hazardous financial deals.

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<sup>193</sup> Muhammad Ibn Muhammad Ibn Muhammad **Abû Hâmid Al-Ghazâlî**, Al-Mankhûl fî Ta'liqât Al-Usûl, p.369. Verified by Dr. Muhammad Hasan Hîtô. Damascus: Dâr Al-Fikr Press, 1400/1980.

## **Al-Qâ'idah no. 2:**

الضَّرَرُ يُزَالُ

(*Ad-darar yuzal*)

Harm should be eliminated

Detriment should be overruled when it takes place.

### **Examples:**

- Numerous pacts including *Khayarât* (خَيَارَاتُ, options) such as *Khayârul-'Aib* (خَيَارُ الْعَيْبِ),<sup>194</sup> or *Khayârul-Ghabn* (خَيَارُ الْغَبْنِ),<sup>195</sup> and so on, are legalized in order to remove difficulties that may happen to the contracting parties.<sup>196</sup>
- If a tree extends to the neighbor's wall engendering trouble, the tree's owner should eliminate the damage.
- One ought to recompense others when detriment is incurred by him.

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<sup>194</sup> The option of dissolving the contract on discovery of a defect.

<sup>195</sup> The option of deception.

<sup>196</sup> Dr. **Az-Zurqqâ**, Al-Madkhal, Vol.2, p.993, chapter 81, passage 20.

### **Al-Qâ'idah no. 3:**

الضَّرَرُ لَا يُزَالُ بِالضَّرَرِ أَوْ الضَّرَرُ لَا يُزَالُ بِمِثْلِهِ

(*Ad-darar lâ yuzâl be ad-darar* or *d-darar lâ yuzâl be mithlih*)  
Harm should not be overruled by another harm or by the same harm

Detriment should be overridden by the least harm and without drawing parallel or much harm.

#### **Examples:**

- When a Muslim is being forced to murder another Muslim, he must not take the person's life since it is not permissible to get rid of oppression by means of similar oppression.
- In case of starvation, it is not permitted for a person who wishes to save his life to seize someone else's food who also needs to survive.
- The mortgagee, by the permission of the ruler, can spend on the mortgaged object keeping it in a good state when the mortgagor declines to expend on it; yet, the mortgagee's expenses will be the mortgagor's debt.<sup>197</sup>

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<sup>197</sup> **Az-Zurqqâ**, Sharh Al-Qawâ'id, p.195.

#### **Al-Qâ'idah no. 4:**

الضَّرُّ الْأَشَدُّ يُزَالُ بِالضَّرِّ الْأَخَفِّ

*Ad-darar al-ashadd yuzâl be ad-darar al-akhaff*)

Severe harm is removed by lesser harm

In *Furû'* (فُرُوعُ, varied questions or branches) of *Fiqh* and *Ahkâm*, people take shelter from life's difficulties. In fact, this *Qâ'idah* has been utilized in many significant ways:

”يُخْتَارُ أَهْوَنُ الشَّرَّيْنِ أَوْ أَخَفُّ الضَّرَرَيْنِ”

*(Yukhtâr ahwan ash-sharriyyen aw akhaff ad-darariyyen)*

”إِذَا تَعَارَضَتِ مَفْسَدَتَانِ رُوِيَ أَعْظَمَهُمَا ضَرَرًا بَارْتِكَابِ أَخَفَّهُمَا”

*(Idhâ ta'ârad mafsadatân rû'iy a'zamahumâ darar be irtikâb akhffahumâ)*

”إِذَا اجْتَمَعَ ضَرَرَانِ يُسْقِطُ الْأَصْغَرُ الْأَكْبَرَ”

*(Idhâ ij tama' dararân usqqit al-asghar al-akbar)."*

In principle, the three *Qawâ'id* above have comparable meanings saying when you are between the devil and the deep blue sea, choose the lesser of two evils.

#### **Evidence:**

A man who is distressed by a couple of equal calamities or cases (calling on him to commit *Harâm*) can elect whatever he is able to endure. However, when both are not the same, he ought to vote on the lesser one since committing *Harâm* is not allowed except by *Darûrah*, and there is no *Darûrah* here to choose the severer or the harder.<sup>198</sup>

<sup>198</sup> **Al-Atâsî**, *Sharh Majalat Al-Ahkâm*, Vol.1, p.68. Moreover, in *Al-Ashbâh Wan-Nazâ'ir*, by **Ibn Nujaim**, p.17.

**Examples:**

- If Muslims are besieged by disbelievers who refuse to release them except for money, then money should be used to release the believers.<sup>199</sup>
- Splitting a dead mother's belly is lawful on the condition that the fetus is expected to survive.

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<sup>199</sup> **As-Seyûtî**, Al-Ashbâh Wan-Nazâ'ir, p.88.

### **Al-Qâ'idah no. 5:**

يُتَحَمَّلُ الضَّرَرُ الْخَاصُّ لِدَفْعِ الضَّرَرِ الْعَامِّ

(*Yutahammal ad-darar al-khâss le daf' ad-darar al-âmm*)  
Facing private harm is tolerated than facing public harm

When a nation or a group of people experience two evils urging people to commit *Harâm*, they must avoid facing a general tragedy. Damages are going to be endurable if a particular disaster only pertains to one or a few men. This *Qâ'idah* is inferred from texts of the Qur'ân and Sunnah, *Ijmâ'*, *Maqâsid* (مَقَاصِدُ, goals) of Sharî'ah, *Al-Masâlih* and *Al-Mursalah*.

To fulfill a collective duty is better than to perform an individual duty. In fact, when one performs an individual good deed, he only liberates himself from the burdens, however, when he performs a deed on behalf of a group, he liberate the group from the burdens.<sup>200</sup>

#### **Examples:**

- An impudent *Muftiy* (مُفْتًى, jurist) could be thwarted from giving Fatwa lest people should be misled or they go behind their caprices.
- An ignorant doctor must be dismissed from his career for fear that people may be hurt because of him.
- In case of monopoly or high prices of some commodities, government officials can fix a price list for them.

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<sup>200</sup> Badr-ud-Dîn Muhammad Ibn Bahâdir Ibn 'Abdullâh **Az-Zarkkashiy**, *Al-Bahr Al-Mohît fî Usûl Al-Fiqh*, Vol.1, p.201. Verified by Muhammad Muhammad Tâmer. Beirut, Lebanon: Dâr Al-Kutub Al-'Ilmiyyah Press, Volume 4, 1<sup>st</sup>, 1421/2001.



### Al-Qâ'idah no. 6:

حَذَرُ الْمَفَاسِدِ أَوْلَى مِنْ جَلْبِ الْمَصَالِحِ

(*Dar' al-mafâsid awlâ men jalb al-masâlih*)

Avoiding detriment takes precedence over bringing about benefit

When *Mafsadah* (مَفْسَدَةٌ)<sup>201</sup> and *Maslahah* (مَصْلَحَةٌ)<sup>202</sup> are mixed together, people are supposed to leave both of them so long as people cannot extract the benefit solely. Sharī'ah is very keen to encourage man to leave the forbidden more than to do the commands. Detriment may increase if we do not frustrate it immediately.

#### Evidence:

- First, from the Qur'ân:

Allâh Al-Hakîm (الْحَكِيمُ, the All-Wise) says:

وَلَا تَسُبُّوا الَّذِينَ يَدْعُونَ مِنْ دُونِ اللَّهِ فَيَسُبُّوا اللَّهَ عَدْوًا بِغَيْرِ عِلْمٍ ...

(And insult not those whom they (disbelievers) worship besides Allâh, lest they insult Allâh wrongfully without knowledge...)

(Sûrah 6. Al-An'âm, Âyah 108)

- Second, from the Sunnah:

دَنَّا إِسْمَاعِيلُ حَدَّثَنِي مَالِكٌ عَنْ أَبِي الزِّنَادِ عَنْ الْأَعْرَجِ عَنْ أَبِي هُرَيْرَةَ: عَنْ النَّبِيِّ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ قَالَ ( دَعُونِي مَا تَرَكْتُكُمْ إِنَّمَا أَهْلَكَ مَنْ كَانَ قَبْلَكُمْ سَوَّاهُمْ وَاخْتَلَفَهُمْ عَلَى أَنْبِيَائِهِمْ فَإِذَا نَهَيْتُكُمْ عَنْ شَيْءٍ فَاجْتَنِبُوهُ وَإِذَا أَمَرْتُكُمْ بِأَمْرٍ فَأَتُوا مِنْهُ مَا اسْتَطَعْتُمْ ).

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<sup>201</sup> Harm, detriment, evil, and so on.

<sup>202</sup> Benefit, help, good, and so on.

Narrated Ismâ'il that Mâlik that Abî az-Zinâd that al-A'raj that Abû Huraiyrah رضى الله عنه:

Allâh's Messenger صلى الله عليه وسلم said, "Whatever I forbid, you must leave it without delay, and whatever I command, do it as much as possible".<sup>203</sup>

### **Examples:**

- If there is no secure place for taking a necessary shower, a woman may postpone performing Salâh since exposing her body is a great *Mafsadah*.
- A man is not allowed to open a window exposing his neighbor's privacy.
- The number of those who perform Hajj (pilgrimage) or 'Umrah (lesser Hajj) needs to be reduced lest they should perish; in particular those who performed it before. Should they spend Hajj's or 'Umrah's charges in Allâh's cause i.e. for the poor, those in debt, seekers of knowledge of Islâm, and so on, that would be appropriate for them.<sup>204</sup>

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<sup>203</sup> Sahîh Al-Bukhârî, chapter: Taking shelter by the Holy Qur'ân and the Sunnah, 6858.

<sup>204</sup> Dr. Yûsuf **Al-Qaradâwî**, "Fiqh Al-Awlawiyât" p.94 in At-Tatbiqât Al-Mu'âsirah le sadduth-Tharâ'i', by, Dr. Yûsuf 'Abdur-Rahmân **Al-Fart**, p.18. Cairo, Egypt: Al-Bardî Press, Printed no. 2002/18363.

## القاعدة الكلية الكبرى الخامسة

### The Fifth *Qâ'idah Kulliyyah Kubrâ*

#### العادة مُحَكَّمَةٌ

(*Al-'âdah muhakkamah*)

Custom is the basis of judgement

Since *Al-'Urf* (العُرْفُ) influences numerous *Ahkâm*, scholars have paid it great attention. First, we need to know the meaning of *Al-'Urf*. Any act that may be good or bad according to one's mind or Sharî'ah is the '*Urf*'.<sup>205</sup> *Al-'Urf* is what is stabilized in the souls and instilled in people's minds and nature.<sup>206</sup>

In addition, *Al-Ma'rûf* (المَعْرُوفُ) is a general name including worshipping Allâh, dealing with people in a reasonable manner, and commands and prohibitions of Sharî'ah. Besides, it is familiar to people, so they accept it and do not reject it. *Al-Munkar* is its opposite.<sup>207</sup>

Having confidence in this *Qâ'idah*, *Al-'Urf* is considered one of the *Adillah Shar'iyyah*, namely it has the ability to evaluate questions and cases, and it can give decisions regarding them unless there is *Nuss* from the Qur'ân or Sunnah contrary to it. If a situation contains '*Urf* and *Nuss*, we can avoid '*Urf*, and judge

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<sup>205</sup> Al-Hasan Ibn Muhammad **Ar-Râghib Al-Asfahâniy**, *Al-Mufradât fî Gharîb Al-Qur'ân*, Vol. 1, p. 561. Damascus: Dâr Al-Qalam Press, 1<sup>st</sup>. ed. 1412/1982.

<sup>206</sup> **Aj-Jerjânî**, *At-Ta'rifât*, p. 193.

<sup>207</sup> 'Abul-Fadl Jamâl-ud-Dîn Muhammad Ibn Makram **Ibn-Manzûr** (d.711/1311), *Lisân Al-'Arab*, Vol.9, p.236. Lebanon: Dâr Sâdir Press, Volume 15, 2ed.

by counting on *Nuss*. Imâm Al-Isnâwâi (d.722/1322)<sup>208</sup> said, “When a question or a case has no solution in Sharî’ah or Arabic language, we have better resort to *Al-’Urf*.”<sup>209</sup>

### **‘Urf has two forms:**

- I. **Lawful ‘Urf** does not contradict *Nuss*, incurs more probable *Mafsadah* (a source of harm or ruin, or a reason of corruption or evil) or ignores permitted *Maslahah*. People, for example, are used to fixing prices, dealing with different currencies, defining expressions and words employed in contracts.
- II. **Unlawful ‘Urf**, on the contrary, challenges the *Nuss*, invites to more probable *Mafsadah* or closes the eyes to permitted *Maslahah*. Many people, for example, are used to devouring *Ribâ*.<sup>210</sup>

### **Evidence:**

#### **• First, from the Qur’ân:**

Indicating the significance of *Al-’Urf* concerning passing *Ahkâm*, the words “*Al-’Urf*” and “*Al-Ma’rûf*” are repeated in the Noble Qur’ân about 37 times. The following are some of these *Âyât*:

Allâh Al-‘Alîm (الْعَلِيمُ), the All-Knowing about the state of the people) says:

(خُذِ الْعَفْوَ وَأْمُرْ بِالْعُرْفِ وَأَعْرِضْ عَنِ الْجَاهِلِينَ)

(Show forgiveness, enjoin what is good, and turn away from the foolish (i.e. don’t punish them).)

(Sûrah 7. Al-A’râf, Âyah 199)

Allâh the One Who knows best the transgressors says:

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<sup>208</sup> ‘Abdur-Rahîm Ibn Al-Hasan Ibn ‘Alî Al-Isnâwî ash-Shâfi’iy Abû Muhammad Jamâlud-Dîn, see *Al-A’lâm* ed. by **Az-Zarkkalî**, Vol.3, p.344.

<sup>209</sup> Jamâl-ud-Dîn Abû Muhammad ‘Abdur-Rahîm Ibn Al-Hasan **Al-Isnâwî**, “At-Tamhîd fî Takhrîj Al-Furu’ ‘alâ Al-Usûl,” in *Al-Qawâ’id Al-Fiqhiyyah* ed. by Dr. **An-Nadawî**, p.296.

<sup>210</sup> ‘Abdullâh Ibn Yusuf **Al-Judiy**, *Taysîr ‘Ilm Usûl Al-Fiqh*, Vol.2, p.64. written in 1418/1997.

(...فَمَنْ عُفِيَ لَهُ مِنْ أَخِيهِ شَيْءٌ فَاتَّبَاعُ بِالْمَعْرُوفِ وَأَدَاءٌ إِلَيْهِ بِإِحْسَانٍ ...)

(...then the relatives (of the killed person) should demand blood-money in a reasonable manner, and the killer must pay with handsome gratitude...)

(Sûrah 2. Al-Baqrah, Âyah 178)

Allâh Al-Malik (المَلِكُ, the King), Al-Mâlik (المَالِكُ, the Owner of the dominion) says:

(كُتِبَ عَلَيْكُمْ إِذَا حَضَرَ أَحَدَكُمُ الْمَوْتُ إِنْ تَرَكَ خَيْرًا الْوَصِيَّةُ لِلْوَالِدَيْنِ وَالْأَقْرَبِينَ بِالْمَعْرُوفِ حَقًّا عَلَى الْمُتَّقِينَ )

(It is prescribed for you, when death approaches any of you, if he leaves wealth, that he makes a bequest to parents and next of kin, according to reasonable manners. (this is) a duty upon *Al-Muttaqûn* (الْمُتَّقِينَ, the pious).)

(Sûrah 2. Al-Baqrah, Âyah 180)

## • Second, from the Sunnah:

Directly or indirectly, the word “*Al-Ma’rûf*” appears in the venerable Sunnah:

حَدَّثَنَا أَبُو نُعَيْمٍ حَدَّثَنَا سُفْيَانُ عَنْ هِشَامٍ عَنْ عُرْوَةَ عَنْ عَائِشَةَ رَضِيَ اللَّهُ عَنْهَا: قَالَتْ هُنْدُ أُمُّ مُعَاوِيَةَ لِرَسُولِ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ إِنَّ أَبَا سُفْيَانَ رَجُلٌ شَحِيحٌ فَهَلْ عَلَيَّ جُنَاحٌ أَنْ أَخَذَ مَالَهُ سِرًّا ؟ . قَالَ: ( خُذِي أَنْتِ وَبَنُوكِ مَا يَكْفِيكِ بِالْمَعْرُوفِ ).

Narrated Abû Nu‘iym that Sufyân that Hishâm that ‘Urwah that ‘Â’ishah, Mother of the Believers, رضي الله عنهما:

“Abû Sufyân is greedy, so am I sinful if I secretly takes some of his money?

Hind, the wife of Abû Sufyân, asked. “You can take from your husband’s money what is enough for you and your child in *Ma’rûf* (a reasonable manner),”

Allâh's Messenger صلى الله عليه وسلم answered.<sup>211</sup>

Moreover,

حَدَّثَنَا مُحَمَّدٌ هُوَ ابْنُ سَلَامٍ قَالَ حَدَّثَنَا أَبُو مُعَاوِيَةَ حَدَّثَنَا هِشَامُ بْنُ عُرْوَةَ عَنْ أَبِيهِ عَنْ عَائِشَةَ قَالَتْ جَاءَتْ فَاطِمَةُ بِنْتُ أَبِي حُبَيْشٍ إِلَى النَّبِيِّ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ فَقَالَتْ يَا رَسُولَ اللَّهِ إِنِّي أَمْرَأَةٌ أُسْتَحَاضُ فَلَا أَطْهَرُ أَفَادَعُ الصَّلَاةَ فَقَالَ رَسُولُ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ: ( لَا إِنَّمَا ذَلِكَ عِرْقٌ وَلَيْسَ بِحَيْضٍ فَإِذَا أَقْبَلْتَ حَيْضَتُكَ فَدَعِي الصَّلَاةَ وَإِذَا أَدْبَرَتْ

<sup>211</sup> *Sahîh Al-Bukhârî*, hiring and selling trust tradition and custom, 2097.

فَاغْسِلِي عَنْكَ الدَّمَ ثُمَّ صَلِّي قَالَ وَقَالَ أَبِي ثُمَّ تَوَضَّئِي لِكُلِّ صَلَاةٍ حَتَّى يَجِيءَ ذَلِكَ الْوَقْتُ).

Narrated Muhammad that Abû Mu'awiyah that Hishâm ibn 'Urwah that his father that 'Â'ishah, Mother of the Believers رضي الله عنهما:

Fâtimah bint Hubaish رضي الله عنهما told Allâh's Messenger صلى الله عليه وسلم that she always suffered from vaginal bleeding in between her ordinary periods, so she had never been in a state of *Tahârah*. "Shall I leave Salâh? she asked. "No, because it is from a blood vessel and not the menses. So when your real menses begins, give up your Salâh and when it has finished wash off the blood (take a bath) and offer your Salâh," Allah's Messenger صلى الله عليه وسلم replied. Hishâm (the sub narrator) narrated that his father had also said, (the Prophet صلى الله عليه وسلم told her): "Perform ablution for every Salâh till the time of the next period comes."<sup>212</sup>

This Hadîth reveals that the decision or the *Hukm* of the Prophet of Allâh صلى الله عليه وسلم returns to 'Urf and to what continuously occurs.

### **Examples:**

- Inasmuch as educators of Sharî'ah were deprived from donations, it is a duty to hire them due to their revered missions.
- *Ijârah* can be adjudicated lawfully even if there has not been contract between parties but that belongs to works people used to fulfill and get earnings for.<sup>213</sup>
- The periods of menstruation are subjected to *Al-'Âdah*.

<sup>212</sup> Sahîh Al-Bukharî, chapter: Wudû' (ablution), 226.

<sup>213</sup> Muhammad ibn Ahmad ibn 'Arafah **ad-Desûqiy** Al-Mâlikiy, [(d.1230/1815) born and died in Egypt wrote several books such as "Al-Hudûd Al-Fiqhiyyah", Hâshiyh on "Mughnî al-Lâbîb", on "As-Sa'd at-Taftazânî" and on "As-Senûsî", etc.] Hâshiyyat Ad-Desûqiy 'Alâ Ash-Sharh Al-Kâbîr, Vol.4,P.3. verified by Muhammad 'Ilâsh. Beirut: Dâr al-Fikr, Volume 4.

- A jurist ought not to give a person from another country Fatwa before being familiar with the current meaning of the questioner's words in that country.<sup>214</sup>

### **Note**

Suppose a single word were to bear a couple of indications or meanings, the meaning of Sharī'ah and the meaning of 'Urf, what would we do?

- 1- **If the word is employed in Sharī'ah, but it does not form Hukm or Taklīf (تَكْلِيفُ, obligation or legal capacity),** we ought to choose the meaning of 'Urf, particularly in *Al-Aymân* (oaths) as they are based on the 'Urf of the one who takes an oath.
- 2- **If the word is exercised in Sharī'ah and it makes Hukm or Taklīf,** we should give precedence to Sharī'ah over the 'Urf. When, for instance, a man swears he does not offer Salâh, his oath is not broken unless he offers Salâh including *Sujûd* (سُجُودُ, prostration), *Rukû'* (رُكُوعُ),<sup>215</sup> and so on. Besides, when a person swears that he does not observe Sawm, his oath is not violated unless he makes *Niyyah* because avoiding food, drink or having intercourse with his wife without *Niyyah* of Sawm is not considered Sawm.
- 3- **If the word in Sharī'ah refers to a general question or case, yet in 'Urf it denotes a particular question or case,** we select the meaning of Sharī'ah. This is the prevailing opinion in the Hanafiy *Madhhab* and others. When a person, for instance, swears he does not eat meat, his oath is not violated if he eats a dead animal as Sharī'ah does not consider dead animals meat. This

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<sup>214</sup> 'Alī Hiydar, *Durar Al-Hukkâm*, Vol. 1, p.45, passage 40.

<sup>215</sup> The position in Salâh in which the person prostrates himself in a standing position with his body bent forward at the waist and his hands on his knees.

view is according to Hanafiyyah and Shâfi'iyyah, but Hanabelah have two narrations in this matter.<sup>216</sup>

### **Al-Lafz between Linguistic Facts and Habitual Facts:**

#### **Al-Hanafiyyah:**

**Oaths rely on Al-'Urf not on linguistic facts;** there is no difference in this point. So, if a person, for example, takes an oath that he will not consume bread, his oath is broken when he eats what the people of his city used to eat. However, if a man swears that he will not eat meat, his oath is violated when he consumes pig; some Hanafiyyah trust generalization of the linguistic facts.

#### **Ash-Shâfi'iyyah:**

Since Imâm ash-Shâfi'î sometimes would depend on linguistic facts and on the facts of 'Urf, some scholars of Shâfi'iyyah give precedence to linguistic facts over the facts of 'Urf, while the other scholars of Shâfi'iyyah do the opposite. Therefore, if, for example, a man swears that he will not dwell in a house, his oath is broken when he resides in a tent whether he is a Bedouin or a villager; this is the opinion of the first group. However, if he is a Bedouin, his oath is violated when he settles in a house whatever its kind is.

#### **Hanâbelah:**

When the usage of the **general noun** prevails in some of its individuals till it grows a linguistic fact i.e. they use 'Urf:

So, if a person swears that he will not devour *Shewâ'* (شِوَاءُ, a roast), his oath is not broken when he consumes any other food can customarily be roasted.

When the private usage prevails, and that has two shapes:

- a) **A noun that cannot be called a general noun except when it is added by another noun; it cannot come alone or enter in generalization; there is agreement on this point.** So, if, for instance, a man takes an oath that he will not eat/drink *tamr hindiy* (تَمْرُ هِنْدِي, tamarind), his oath is not broken when he eats *tamr* (تَمْرُ, dates) since *tamr hindiy* cannot include all *tamr*.

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<sup>216</sup> Dr. Al-Bornû, Al-Wajîz, pp.286-288.



- b) **A noun that is called a general noun but it mostly needs another noun; it cannot be understood alone; there is no agreement on this point.** Therefore, if, for example, a man swears that he will not eat heads, his oath is broken (according to some of Hanafiyyah) when he eats head/s of fish or birds. His oath, however, is not violated unless he eats a head that people used to eat customarily, according to other Hanafiyyah.

### **Mâlikiyyah:**

**First, oaths rely on *Niyyah* then on incentive then on '*Urf* then on linguistic facts.<sup>217</sup>**

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<sup>217</sup> Dr. **Al-Bornû**, Al-Wajîz, pp. 288-291.

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	situation is considered declaration		
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	provisos		
80.	What is authenticated by evidence like what is proved true by seeing	<i>Ath-thâbit be al-burhân kathâbit be al-‘aiyân</i>	<b>223</b>
81.	What is unlawfully taken, must be rendered back	<i>‘Ala al-yad mâ akhadhat hattâ tu‘addiyah</i>	<b>249</b>
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85.	If no meaning can be attached to a word, altogether to be disregarded	<i>Idhâ ta‘athar i‘mâl al-kalâm yuhmal</i>	<b>202</b>
86.	When something is nullified, its contents are also nullified	<i>Idhâ batal ash-shai’ batal mâ fî dimnih</i>	<b>226</b>
87.	Whatever is proved to be true with certainty, Can only be cancelled by proof	<i>Mâ thabat be yaqîn lâ yartaf‘ illâ be yaqîn</i>	<b>110</b>
88.	Whatever is forbidden to be taken, done or employed; is forbidden to be given, requested or	<i>Mâ hurrim akhdhuh aw fe‘luh aw isti‘mâluh hurrim i‘tâ‘uh aw talabuh aw itikhâdhuh</i>	<b>246</b>

	possessed		
89.	When someone rushes into something before its due time, he is punished by depriving	<i>Mann Ista 'jal ash-shai'a qabl awânih 'uqeb be hermânih</i>	<b>100</b>
90.	Whoever possesses a thing possesses its accessories	<i>Mann malak shai'a malk mâ huwa men darûrâtih</i>	<b>218</b>
91.	Writing is like speaking	<i>Al-kitâbah kal-khitâb</i>	<b>183</b>

## APPENDIX I. GLOSSARY

' <i>Ādah</i>	Habit, routine, practice, and so on.
<i>Adella-tu-Juz'iyyah</i> or <i>Tafsiliyyah</i>	Special texts (from the Qur'ân and Sunnah), analogy and consensus indicate <i>Hukm</i> of a particular action (of a man). For example, Allâh says, (وَأَحَلَّ اللَّهُ الْبَيْعَ وَحَرَّمَ الرِّبَا) (Allâh allows trading and forbids usury); this Ayah is a detailing/partial proof a jurist has extracted a practical <i>Hukm</i> thereby i.e. permitting of trading and forbidding of usury.
' <i>Asr</i>	Afternoon, ' <i>Asr</i> prayer time.
' <i>Awrah</i>	The part of the body which it is illegal to keep naked before others. ' <i>Awrah</i> of man is between the navel and the knee, but ' <i>Awrah</i> for woman is the whole body except face and hands. Also, <i>Awrah</i> means private parts, loins, genital organs, pudenda.
' <i>Ayân</i>	View(ing), seeing, witnessing, and so on.
' <i>Āzimah</i>	A duty imposed by Allâh.
' <i>Ībādah</i>	Worship.
' <i>Tbadât</i>	Acts to worship Allâh.
' <i>Iddah</i>	A period is prescribed by Allâh for divorce and marriage; a period of probation after the death of a woman's husband or after her divorce.
' <i>Ilm Darûry</i>	Inevitable knowledge needs no great deep examination or complicated study like <i>Al-'Ilm Al-Mutawâtir</i> (consecutive knowledge) or the knowledge which comes to be known through the five senses (ears, eyes, tongue, nose and skin).
' <i>Ilmu Muktasab</i>	Acquired knowledge depends on limitless scrutiny to approve (evidence supporting) theories or notions that need to be conceivable, and so on.
' <i>Itikâf</i>	Seclusion in <i>Masjid</i> (a mosque) for worshipping Allâh.
' <i>Urf</i>	Tradition, custom, institution, and so on.
' <i>Ushr</i>	' <i>Ushr</i> ' (a 10% levy)

<i>Adhkar</i> or <i>Idhkir</i>	A kind of grass well-known for its good smell and is found in Hijâz, Saudi Arabia.
<i>Adillah Shar'iyah</i>	Shâri'ah's sources, namely the Qur'ân, the Sunnah and <i>Ijmâ'</i> —there are other sources but there is no consensus on them.
<i>Ahkâm</i>	Judgments of legal decision (especially of Allâh)
<i>Ahkâm Juz'iyah</i>	Minor issues or judgments.
<i>Ahkâm Kulliyyah</i>	Major issues or judgments.
<i>Al-Asl</i>	Sometimes, means <i>Ad-Dalîl</i> (evidence) that people must resort to when <i>Al-Ahkâm</i> (judgments of legal decision (especially of Allâh)) contradict each other. Or origin, basis, principles, fundamental concepts, and so on.
<i>Amân</i>	Protection given by a Muslim conqueror to those who pay <i>Jizyah</i> .
<i>Amr</i>	Ordainment.
<i>Ashbâh</i>	The plural of " <i>shebh</i> " or " <i>shabah</i> " which literally means similitude and resemblance. However, practically it is a true collective description which if it is shared by <i>Al-Asl</i> (origin, basis, principles, fundamental concepts, and so on) and <i>Al-far'-Al-Fiqhiy</i> (a branch of <i>Fiqh</i> ), both of them must be subjected to one rule only.
<i>Awsaq</i>	Plural of <i>Wasq</i> , which is a measure equal to 60 <i>Sa's</i> . 1 <i>Sa'</i> = 3,25 kilograms (approx) and 60×3.25=195 kgms., according to Hanafiyyah. However, <i>Sa'</i> = 2.04 kgms. And 60×2.04=122.4 kgms., according to the majority of scholars.
<i>Badal</i>	An alternative.
<i>Bai'-Al-ma'dûm</i>	A contract for non-existent things.
<i>Bayân</i>	Disclosure or revelation.
<i>Bayyinah, Burhân</i> or <i>Dalîl</i>	Proof, evidence, demonstration, testimony, witness, and so on.
<i>Bid'ah</i>	Heresy (or any innovated practice in religion).

<i>Dalâlah</i>	Connotation, meaning, sense, signification, and so on.
<i>Dâbit</i>	Literally means a block which prevents different questions from coming through or a controller preserves something strictly. It, however, practically means a total <i>Fiqhiy</i> rule which controls and includes more <i>Fûrû‘ Fiqhiyyah</i> (varied branches of <i>Fiqh</i> ) of one chapter of <i>Fiqh</i> .
<i>Darûrah</i>	Necessity.
<i>Dhu-Mahram</i>	A male, whom a woman can never marry because of close relationship (e.g. a brother, a father, an uncle and so on); or her own husband.
<i>Diyyah</i>	Blood money
<i>Faqîh</i>	A learned man who can give religious verdicts.
<i>Faqîr</i>	The poor person who does not beg.
<i>Farîdah</i>	(Plural: <i>Farâ'id</i> ) an enjoined duty.
<i>Fiqh</i>	Jurisprudence.
<i>Furû‘-Al-Fiqh</i>	Varied <i>Fiqhiy</i> questions or branches of Law
<i>Furûq</i>	(Plural of <i>Farq</i> ) means a reparative matter.
<i>Ghalabat-uz-Zunn</i>	A strong probability.
<i>Ghusl</i>	(To take menses bath) or taking a bath in a ceremonial way. This is necessary for one who is <i>Junub</i> .
<i>Hadiyyah</i>	A gift or a present.
<i>Hebah</i>	A deed of gift or to give someone gift, present, and so on, immediately and without exchange.
<i>Haddul-Qadhf</i>	Punishment of eighty lashes for slander.
Hadîth Sahîh [Authentic]	A Hadîth whose chain of narrators has been transmitted by truly pious persons who are known for their uprightness and exactitude, and the hadîth is free from eccentricity and blemish.
Hadîth Hasan [Good]	A Hadîth whose chain of transmission is linked to the narration of an authority with weak exactitude, and the Hadîth has no eccentricity or blemish.

Hadîth Da‘îf [Weak]	A Hadîth that has no the criterion of the authentic Hadîth nor the criterion of the good Hadîth.
<i>Hâjah</i>	Need.
<i>Hajj-at-Tamattu‘</i> and <i>Al-Qirân</i>	<i>Hajj</i> performed with ‘ <i>Umrah</i> preceding it.
<i>Hajr</i>	Placing someone under guardianship after declaring him legally incompetent because of immaturity, insanity or servitude.
<i>Haram</i>	Sanctuaries of Makkah and Al-Madinah.
<i>Harâm</i>	Unlawful, forbidden and punishable matter from the viewpoint of religion.
<i>Hazr</i>	Prohibition, forbiddance, and so on.
<i>Hiwâlah</i>	The transference of a debt from one person to another. It is an agreement whereby a debtor is released from a debt by another becoming responsible for it.
<i>Hudûd</i>	Fixed punishments by Sharî‘ah; or Allâh’s boundary limits for <i>Halâl</i> (lawful) and <i>Haram</i> (unlawful).
<i>Hudûd</i> and <i>Ta‘zîr</i>	Fixed and discretionary punishments.
<i>Hujjah</i>	Reliable proof or an authoritative source.
<i>I‘ârah</i>	Loan.
<i>I‘tiqâd</i>	Belief.
<i>Ihrâm</i>	State of ritual consecration (of a Makkah pilgrim). A state in which one is prohibited to practice certain deeds that are lawful at other times. The ceremonies of ‘ <i>Umrah</i> and <i>Hajj</i> are performed during such a case.
<i>Ijârah</i>	The use and enjoyment of property for a time, includes hire, rental, and lease.
<i>Ijmâ‘</i>	Is the third foundation of Islamic legislation. <i>Ijmâ‘</i> is the consent of all Muslim <i>Mujtahidûn</i> on a legal question. <i>Mujtahid</i> is a Muslim divine of the highest degree of learning, a title usually conferred

by Muslim rulers. *Ijmâ‘* has two kinds: (A) *Ijmâ‘ Qawliy* in which every *Mujtahid* should declare the legal question. (B) *Ijmâ‘ Sukûtiy*, when the majority of the *Mujtahiudûn* signify their tacit assent to the opinions or the minority by “silence”, without objection.

<i>Ijtihâd</i>	An independent judgment in legal question.
<i>Imâmah</i>	The Imamate, function or office of the Salâh leader; leading position.
<i>Imân</i>	Faith, and trust in Allâh.
<i>Iqrâr</i>	Confession, acknowledgment, avowal, owning, admission, and so on.
<i>Arsh</i>	Estimated compensation to be given to injured person by another person.
<i>Istidlâl</i>	Literally means asking for evidence or proof; however, it practically (in this field) means giving evidence or proof which does not depend on a text (from the Qur’ân or Sunnah)
<i>Istihsân</i>	To give a verdict with proof from one’s heart (only) with satisfaction, and one cannot express it (only Abû Hânifah and his pupils say so but the rest of the Muslim religious scholars of the Sunnah (and they are the majority) do not agree to it.
<i>Istis-hâb</i>	The first state of a specific case or matter.
<i>Istis-hab- Al-Hâl</i>	That we believe that something exists continuously inasmuch as it surely existed before.
<i>Istis-hâb-Al- ‘Umûm</i>	An authenticated matter (in the past) because of a general proof must stay as it was until specific evidence comes to individualize it.
<i>Istis-hâb-an-Nuss:</i>	An authenticated matter (in the past) because of <i>Nuss</i> (a text from the Qur’ân or the Sunnah) must stay as it was until abrogating <i>Nuss</i> comes to abrogate it.
<i>Istisnâ‘</i>	Sale in the form of a contract for manufacture.



<i>Ji‘âlah</i>	A reward given to a person for doing something.
<i>Jihâd</i>	Fighting in the Cause of Allâh or any other kind of effort to make Allâh’s Word superior.
<i>Jimâr</i>	The three pillars at Mina, at which the Makkan pilgrims throw seven pebbles.
<i>Jiziyah</i>	Head tax levied from the non-Muslims people (Jews and Christians, and so on) who are under the protection of a Muslim government.
<i>Kafâlatun- ben-Nafs</i>	Bail (especially for due appearance of a person in court).
<i>Kaffârah</i>	Religious expiation for killing, oaths or having intercourse during the day in Ramadân.
<i>Kaffârat-ul-Yamîn</i>	Expiation of an unfulfilled oath.
<i>Kaffârat-dh-Dhunûb</i>	Expiation of sins.
<i>Kalâm</i>	Discourse, words, speech, and so on.
<i>Kalâm Mutlaq</i>	Unrestrained discourse.
<i>Kamâliyât</i>	Luxuries, articles of luxury; nonessentials, and so on.
<i>Khayarât</i>	(Options) such as <i>Khiyâr Al-‘Aib</i> (the option of dissolving the contract on discovery of defect), or <i>Khiyâr Al-Ghabn</i> (the option of deception).
<i>Khilâf-Al-Awlâ</i>	To do something that is good but is not the optimum.
<i>Khul‘</i>	(A kind of divorce) the parting of a wife from her husband by giving him a certain compensation, or to return back the <i>Mahr</i> (dowry) which he gave her.
<i>Lafz</i>	Word/s.
<i>Li‘ân</i>	An oath that is taken by both the wife and the husband when he accuses his wife of committing illegal sexual intercourse. <i>Li‘ân</i> is a form of divorce which takes place under the following circumstances: If a man accuses his wife of adultery and does not prove it by four witnesses,

he must swear before Allâh that he is the teller of truth four times, and then add: "If I am a liar, may Allâh curse me". The wife then says four times, "I swear before Allâh that my husband lies, and then adds: "May Allâh's anger be upon me if this man be a teller of truth". After this, a divorce takes place.

<i>Luqatah</i>	Lost property.
<i>Ma 'ruf</i>	Islamic Monotheism and all that Islâm has ordained.
<i>Ma'fsadah</i>	A source of harm or ruin, or a reason of corruption or evil, harm, detriment, evil, and so on.
<i>Mahr</i>	Bridal-money given by the husband to the wife at the time of marriage.
<i>Makrûh</i>	Not approved of, undesirable from the point of view of religion, although not punishable.
<i>Maqâsid</i> (the plural of <i>Maqsid</i> )	Intent(ion), purpose, design, aim, end, goal, object(ive).
<i>Mashê'ah</i>	("in shâ'a Allâh" (God willing))
<i>Masâlih Mursalah</i>	Unspecified public interests.
<i>Maslahah</i>	Benefit, help, good, and so on.
<i>Matbû'</i>	Origin, principal, leader, independent, superior, senior, and so on.
<i>Mathîl</i>	Match.
<i>Mawlâ</i>	A person of slave origin who does not have tribal protection. It is a word with dual meaning. It can mean either master or servant.
<i>Miskîn</i>	The poor person who begs.
<i>Mubâh</i>	Permissible, permitted, allowable, allowed, admissible, lawful, legal, and so on.
<i>Mudd</i>	A measure of two thirds of a kilogram (approx.) It may less or more.
<i>'Mudârabah</i>	A contract of copartnership, of which the one party (namely the proprietor) is entitled to a profit on

	account of the stock, he being denominated <i>Rabb-ul-mâl</i> , or proprietor of the stock, and the other party is entitled to a profit on account of his labor, and this last is denominated the <i>mudarib</i> (or manager). A contract of <i>mudârabah</i> cannot be established without participation in the profit.
<i>Muftiy</i>	Legist, jurisprudent ,jurist ,scholar, expert, and so on.
<i>Muhalil</i>	The man who marries an irrevocable divorcee in order to make her lawful for her former husband if he wishes to marry her. Moreover, this marriage, with no condition in the contract, is correct according to Hanafiyyah but correct and disliked according to Shâfi‘iyyah . It, however, is <i>Harâm</i> , even there is no condition on the contract, according to Mâlikiyyah and Hanabelah
<i>Muhrim</i>	One who assumes the state of <i>Ihrâm</i> for the purpose of performing the <i>Hajj</i> or <i>‘Umrah</i> .
<i>Mujtahid</i>	An independent scholar.
<i>Mukalafûn</i>	Those who have reached majority and have full use of intellect.
<i>Mumâthalah</i>	Exact equivalence.
<i>Munâzarah</i>	not exact equivalence which necessitates sharing even in one aspect of a specific matter.
<i>Munkar</i>	Polytheism, disbelief and all that Islâm has forbidden.
<i>Mushâbahah</i>	Likeness.
<i>Mustahâdah</i>	A woman who has bleeding from the womb in between her ordinary periods.
<i>Mutakalimûn</i>	Scholars trusted views.
<i>Mutlaq</i>	Absolute; unlimited, unrestricted matter, and so on.
<i>Nâfilah</i>	Supererogatory <i>Salâh</i> .

<i>Nafl</i>	Supererogatory performance or optional worship.
<i>Nahyu</i>	Prohibition, interdiction, forbiddance, forbidding, and so on.
<i>Nuss</i>	Text whether from the Qur‘ân or the Sunnah.
<i>Nawâzel</i>	New questions related to recent events.
<i>Nazariyyah</i>	Literally means theory or notion and practically refers to a group of imaginations or conceptions which are logically stuck together displaying the relations between results and premises.
<i>Nazîr</i>	An equal or a counterpart.
<i>Nikâh</i>	Literally means sexual intercourse; whereas, metaphorically it means marriage, according to <i>Hanafiyyah</i> .
<i>Niyyah</i>	Intent(ion), purpose, design or secret.
<i>Qâ‘idah</i>	A total rule or case which includes all the <i>Furû‘</i> (varied <i>branches of Fiqh</i> ) come beneath it or a major rule or case including the most <i>Furû‘</i> which flow beneath it.
<i>Qadhf</i>	Accusing a virtuous man or woman of adultery.
<i>Qadâ‘</i>	A matter which is fulfilled later, and it is the opposite of <i>Adâ‘</i> meaning a matter which is fulfilled immediately.
<i>Qasr-us-Salâh</i>	Shortening of prayer, to shorten the obligatory Salâh of four <i>Rak‘ah</i> to two each, but the <i>‘Ishâ‘</i> (Evening) and the <i>Fajr</i> (Early Morning) Salâh remains unchanged.
<i>Al-Qawâ‘id</i>	Normative legal maxims.
<i>Kulliyyah Kubrâ</i>	
<i>Al-Qawâ‘id</i>	Non-Normative Legal Maxims.
<i>Kulliyyah Ghair Kubrâ</i>	
<i>Qiblah</i>	The direction in which all Muslims turn their faces in prayers and that direction is towards Ka‘bah in

	Makkah (Saudi Arabia).
<i>Qisâs</i>	(retaliation), is that punishment which, although fixed by the law, can be remitted by the person offended against, or, in the case of murdered person, by his heirs.
<i>Qiyâs</i>	Verdicts and judgments given by the Islamic religious scholars. These are given on the following proofs respectively:- (A) From the Qur'ân; (B) From the Prophet's "Sunnah." (C) From the unanimously accepted verdict of the <i>Mujtahidûn</i> ; (D) <i>Qiyâs</i> : i.e. the verdict given by a <i>Mujtahid</i> who considered the case similar in comparison with a case judged by the Prophet ﷺ. <i>Qiyâs</i> is not to be practiced except if the judgment of the case is not found in the first three above mentioned proofs A,B, C.
<i>Qurubât</i>	Pious works or good acts which bring man nearer to Allâh.
<i>Raj'ah</i>	Receiving back a wife who has been divorced, before the period of <i>'Iddah</i> has fully elapsed.
<i>Rak'ah</i>	The prayer of Muslims consists of <i>Rak'ât</i> (singular- <i>Rak'ah</i> ), which consists of one standing, one bowing and two prostrations.
<i>Ribâ</i> (usury)	Usury, which is of two major kinds: (a) <i>Ribâ an-Nasî'ah</i> , i.e. interest on lent money; (b) <i>Ribâ Al-Fadl</i> , i.e. taking a superior thing of the same kind of goods by giving more of the same kind of goods of inferior quality, e.g., dates of superior quality of dates of inferior quality in greater amount. Islam strictly forbids all kinds of usury.
<i>Riwâyah</i>	Narration of the Messenger's Hadîth ﷺ.
<i>Rukhsah</i>	License, permit, authorization, warrant concession, franchise; permission, leave of Sharî'ah.
<i>Rukû'</i>	The position in Salâh in which the person

	prostrates himself in a standing position with his body bent forward at the waist and his hands on his knees.
<i>Sadd-uz-Zarâ'i'</i>	Prohibition of evasive legal devices.
<i>Sahw</i>	Forgetting (here it means forgetting how many <i>Rak'ât</i> a person has prayed, in which case he should perform two prostration of <i>Sahw</i> ).
<i>Salam</i>	The Synonym of <i>salaf</i> means a sale in which the price is paid at once for goods to be delivered late.
Science of <i>Furûq</i>	Practically, it means realizing the separative matters between two similar questions.
<i>Shabîh</i>	A similar one.
<i>Shahâdah</i>	Testimony.
<i>Shakk</i>	Doubt, connotes two unequal matters that strike man.
<i>Shar'</i> or <i>Sharî'ah</i>	Revelation or the canonical law of Islam.
<i>Shubhah</i>	Something is not known exactly <i>Halâl</i> or <i>Harâm</i> or when one depends on an inappropriate proof.
<i>Shuf'ah</i>	“Adjunction”. The right of pre-emption is the power of possessing property that is for sale. It does not apply to movable property but to immovable property.
<i>Sujûd</i>	Prostration.
<i>Sâ'</i>	A measure that equals four <i>Mudds</i> (3 kg. approx).
<i>Sadaqah</i>	Charity, alms, and so on, or anything given in charity.
<i>Sawm</i>	Fasting, to abstain from food, drink and sexual intercourse before the break of the dawn till sunset.
<i>Tabarru'</i>	Donation, subsidy, monetary aid, and so on.
<i>Tabarruk</i>	Seeking Allâh's blessing.
<i>Tâbi'</i>	A follower, adherent, dependent, etc and so on
<i>Tahrîm</i>	Prohibition.
<i>Takhsîs</i>	Specialization, specification, and so on.

<i>Taklîf</i>	Obligation or Legal capacity.
<i>Taqîd</i>	Imitation in the <i>Fiqh</i> .
<i>Taqyîd</i>	Confinement, limitation, restriction, and so on.
<i>Tarjîh</i>	Favouring means.
<i>Taslîm</i>	On finishing the prayer, one turns one's face to the right and then to the left saying, <i>As-Salam 'Alaikum wa Rahmtullâh</i> (Peace and Mercy of Allâh be on you).
<i>Tawhîd</i>	<p>Confirming the oneness of Allâh, the Most-High. It has three aspects; A, B and C:</p> <p>Oneness of the Lordship of Allâh; <i>Tawhîd-ar-Rububiyyah</i>: To believe that there is only one Lord for the entire universe, its Creator, Organizer, Planner, Sustainer, and the Giver of security, and so on, and that is Allâh.</p> <p>(B) Oneness of the worship of Allâh; <i>Tawhîd-Al-Uluhiyyah</i>: To believe that none has the right to be worshipped [e.g. praying, involving, asking for help (from the unseen), swearing, slaughtering sacrifices, giving charity, fasting, pilgrimage, and so on], but Allâh.</p> <p>(C) Oneness of the Names and the Qualities of Allâh; <i>Tawhîd-Al-Asmâ' was-Sifât</i>: To believe that : (i) we must not name or qualify Allâh except with what He has or His Messenger صلى الله عليه وسلم has named or qualified him, (ii) none can be named or qualified with the Names or Qualifications of Allâh; e.g. <i>Al-Karîm</i>; (iii) we must confirm all Allâh's qualifications which Allâh has stated in His Book (the Qur'ân) or mentioned through His Messenger (Muhammad صلى الله عليه وسلم) without changing them or ignoring them completely or twisting the meanings or giving resemblance to any of the created things; e.g. Allâh is present over</p>

His Throne as mentioned in the Qur'ân. (V.20:5): “The Most Beneficent (Allâh) *Istawâ* (rose over) the (Mighty) Throne” over the seventh heaven; and He only comes down over the first (nearest) heaven (to us) during the day of ‘Arafât (*Hajj*, i.e. 9<sup>th</sup> Dhul-Hijjah) and also during the last third part of the night, as mentioned by the Prophet ﷺ, but He is with us by His Knowledge only, not by His Personal Self (*Be-Dhâtih*), “There is nothing like unto Him, and He is the All-Hear, the All-Seer.” (The Qur'ân, V.42:11).

This noble *Âyah* confirms the quality of hearing and the quality of sight for Allâh without resemblance to others; and likewise He also says:

“To one whom I have created with Both My Hands,” (V.38:75); and He also says:

“The Hand of Allâh is over their hands.” : (V. 48:10, The Qur'ân). This confirms two Hands for Allâh, but there is no similarity for them.

This is the Faith of all true believers, and was the Faith of all the Prophets of Allâh from Noah, Abraham, Moses and Christ till the last of the Prophets, Muhammad ﷺ

It is also essential to follow Allâh's Messenger Muhammad ﷺ: *Wajib Al-Ittbâ'* and it is a part of *Tawhîd-Al-Ulihyah*. This is included in the meanings: “I testify that Muhammad ﷺ is the Messenger of Allâh” and this means, “None has the right to be followed after Allâh's Book (the Qur'ân), but Allâh's Messenger ﷺ”. [see the Qur'ân (V.59:7) and (V.3:31)].

Tayammum

Sand ablution, to put or strike lightly the hands over clean earth and then pass the palm of each on the back of the other, blow off the dust and then



	pass them over the face. This is performed instead of ablution ( <i>Wudû'</i> ) and <i>Ghusl</i> (in case of <i>Janabah</i> and so on).
<i>Tâhir</i> or one is in a state of “ <i>Tahârah</i> ”, in <i>Fiqhiy</i> meaning	A Muslim who cleans and purifies himself from <i>Al-Hadath Al-Akbar</i> (sexual discharge) and <i>Al-Hadath Al-Asghar</i> (passing urine, stool or wind). <i>Najis</i> (or one is in the state of <i>Najâsah</i> ) bears the opposite meaning.
<i>Tawâf</i>	The circumambulation of the Ka‘bah.
<i>Tayibât</i>	All kinds of <i>Halal</i> (lawful) things.
<i>Usûliyyîn</i>	Scholars trust texts.
<i>Usûl</i>	Origin, basis, principles, fundamental concepts, and so on.
<i>Usûl Al-Fiqh</i>	Methodology in Islamic jurisprudence.
<i>Wâjib</i>	Duty, obligation task, assignment, and so on.
<i>Wâjib Mutlaq</i>	An absolute or an unlimited duty, obligation, task, assignment, and so on.
<i>Walad</i>	In Arabic connotes male/s and female/s of one’s offspring.
<i>Walâ’</i>	Literally means proximity, kin, friendship. A peculiar relationship voluntarily established, and which confers a right of inheritance on one or both parties connected.
<i>Walâ’-ul-‘Itâqah</i>	Relationship between a master and a manumitted slave, in which the former inherits any property the latter may acquire after emancipation.
<i>Walâ’-u al-Muwâlâh</i>	The connection arising out of mutual friendship, especially between a Muslim and a convert.
<i>Waliy-Al- ‘Amr, Râ‘î or Imâm</i>	A ruler, a legal guardian or an appointee.
<i>Waliy-ul- Waqf</i>	A person responsible for endowments.
<i>Wasiyah</i>	Wills or testaments.
<i>Wilâyah</i>	The act of taking as a friend or appointing as heir.
<i>Wqaf</i>	Religious endowment, something is donated for a

	charitable purpose.
Zakâh	A certain fixed proportion of the wealth (2 ½ %) of every Muslim to be paid yearly for the benefit of the poor in the Muslim community. The payment of Zakâh is obligatory as it is one of the five pillars of Islam. Zakâh is the major economic means for establishing social justice and leading the Muslim society to prosperity and security.
Zakâh-Al-Mâl	A fixed amount of property upon which Zakâh is due.
Zinâ	Adultery or fornication.
Zâhîr	Apparent meaning.
Zâhir-ul-Lafz	External meaning.
Zihâr	The likening of a woman to kinswomen within the prohibition degrees.
Zuhr	Noon, mid-day prayer is called <i>Zuhr</i> prayer.
Zunn	Conjecture, means that there are two equal matters crossing someone's mind.

## **APPENDIX II.**

### **SOURCES CONSULTED**

The following entries, which have the transliterated titles as they appear in the entire thesis (underlined books' titles), have been classified by:

#### **Arabic Sources:**

- The Noble Qur'ân
- The Prophetic Traditional Books
- Scholars of the past (may Allah shower them all with His mercy and grace): according the (A.H, Hijri) date of death of each scholar,
- Contemporary scholars (may Allah protect them all)

### **The Exegesis of the Noble Qur'ân**

- ❖ **Al-Qurtubî** Abû ‘Abdullâh Muhammad ibn Ahmad Al-Ansâriy. Al-Jâmi‘le Ahkâm Al-Qur’ân. Cairo: Dâru Ash-Sha‘b, Volume 8.

### **The Prophetic Traditional Books**

- ❖ **Abû Dâwûd** Suliymân Ibn Al-Ash‘as As-Sijistâtniy Al-Azdiy. Sunan Abî Dâwûd. Verified by Muhammad Mohy-ud-Dîn ‘Abdul-Hamîd and authenticated by Nâsir-ud-Dîn Al-Albâniy. Dâr Al-Fikr, Volume 4.
- ❖ **‘Abdur-Razzâq** Abû Bakr ibn Hammâm as-San‘âniy Musannaf ‘Abdur-Razzâq, chapter: Sales 15113, verified by Habîbur-Rahmân Al-A‘zamî. Beirut, Al-Maktab Al-Islâmiy, 2nd. Ed. Vol. 11.
- ❖ **Ad-Dâraqotnî** ‘Alî Ibn ‘Umar Abul-Hasan Al-Bagdâdiy. Sunan ad-Dâraqotnî. Verified by As-Sayyid ‘Abdullâh Hâshim Yamâniy Al-Madaniy. Beirut, Lebanon: Dâr Al-Ma‘rifah. Press Volume 4, 1386/1967.
- ❖ **Ad-Dâriâmî** ‘Abdullâh Ibn ‘Abdur-Rahmâm Ibn Muhammad. Sunan ad-Dârimî. Verified by Fawâz Ahmad Zamarlaî and Khâlid As-Sab‘-Al‘alamî and authenticated by Hussein Salîm Asad. Beirut, Lebanon: Dâr Al-Kitâb Al-‘Arabiyy Press. Volume 2, 1<sup>st</sup>. ed., 1407/1987.
- ❖ **Al-Bukhârî** Muhammad Ibn Ismâ‘îl Abû ‘Abdullâh Al-Ja‘fî. Al-Jâmi‘ As-Sahîh Al-Mukhtasar (Sahîh Al-Bukhariy). Verified by Dr. Mustafâ Dîb Al-Baghâ. Beirut, Lebanon: Dâr Ibn Kathîr Press. Volume 6, 3<sup>rd</sup>. ed., 1407/1987.
- ❖ **Al-Hâkim** Muhammad Ibn ‘Abdullâh Abû ‘Abdullâh an-Niysaboury. Al-Mustadrak ‘alâ as-Sahîhiyyyn. Authenticated by Adh-Dhahabî in "Talkhîs Mustadrak ‘alâ as-Sahîhiyyyn." and verified by Mustafâ ‘Abdul-Qâdir ‘Atâ. Beirut, Lebanon: Dâr Al-Kutub Al-‘Ilmiyyah Press, Volume 4, 1<sup>st</sup>. ed. 1411/1990.

- ❖ **At-Trimidhî** Muhammad Ibn ‘Isâ Abû ‘Isâ As-Salamiy. Aj-Jâmi‘As-Sâhîh Sunan At-Tirmidhî. Verified by Ahmad shâker and others and authenticated by Nâsir-us-Dîn Al-Albâniy. Beirut, Lebanon: Dâr Ihyâ’ At-Turâth Al-‘Arabiy Press. Volume 5.
- ❖ **Ibn Mâjah** Muhammad Ibn Yazîd Ibn ‘Abdullâh Al-Qazwîniy. Sunan Ibn Mâjah. Verified by Muhammad Fu’âd ‘Abdul-Bâqî and authenticated by Al-Albânî. Beirut, Lebanon: Dâr Al-Fikr Press. Volume 2.
- ❖ **Imâm Ahmad Ibn Hanbal** Abû ‘Abdullâh Ash-Shiybâniy. Musnad Al-Imâm Ahmad Ibn Hanbal. Authenticated by Shu‘iyb Al-Arna’ût. Cairo, Egypt: Qurtubah Foundation Press, Volume 6.
- ❖ **Imâm Mâlik** Ibn Anas. Al-Muwatt’. Verified by Muhammad Mustafâ Al-A‘zamî: The Zayed Charitable Foundation Press. Volume 8, 1<sup>st</sup>. ed., 1425/2004.
- ❖ **Muslim** Ibn Al-Hajjâj Abûl-Hussein Al-Qushairiy an-Niysabouriy. Sahîh Muslim. Verified by Muhammad Fu’âd ‘Abdul-Bâqî. Beirut, Lebanon: Dâr Ihyâ’ At-Turâth Al-‘Arabiy Press. Volume 5.

## SCOLARS OF THE PAST

(may Allah shower them all with His mercy and grace)

d. A.H

182 **Abû Yûsef** Ya‘qûb Ibn Ibrahîm. Al-Kharâj. Cairo, Egypt: As-

Salafiyyah Press.

- 189 **Ash-Shiybânî** Muhammad Ibn Al-Hasan. Al-Asl. Verified by Abûl-Wafâ' Al-Afghânî. India, Hyderabad. Volume 4, 1<sup>st</sup>, ed.
- 204 **Imâm Ash-Shâfi'î** Muhammad Ibn Idrîs. Al-Omm. Beirut, Lebanon: Dâr Al-Ma'rifah Press. Volume 8, ed., 1393/1973.
- 224 **Ibn Salâm** Al-Qâsim. Kitâb Al-Amwâl. Verified by Khalîl Harrâs. Cairo, Egypt: Dâr ash-Sharq Press, 1<sup>st</sup>. ed., 1388/1968.
- 306 **Wakî'** Abû Bakr Muhammad ibn Khalaf ibn Hiyân ibn Sadaqah Ad-Dabbiy Al-Baghdâdî. Akhbâr Al-Qudâh. Verified and authenticated by 'Abdul-'Azîz Al-Marâghî. Cairo, Egypt: Al-Maktabah At-Tejariyyah Al-Kubrâ Press. Volume 3, 1<sup>st</sup>. ed., 1366/1947.
- 340 **Al-Kharkhî** Abû Al-Hasan 'Ubaydullah Ibn Al-Hussein. "Usûl Al-Kharkhî" in Kanz Al-Wusûl le-Ma'arifet Al-Usûl by 'Ali Ibn Muhammad AL-Bazdwî Al-Hanafîy reviewed by Dr. 'Ismatullâh 'Inâyahllâh. Karachi: Jawêd Press.
- 366 **Al-Khushanî** Muhammad Ibn Hârîth Ibn Asad. Usûl Al-Futyâ fî Al-Fiqh 'alâ Madhhab Al-Imâm Mâlik. Verified by Muhammad Al-Majdûb and others. Ad-Dâr Al-'Arabbiyyah lel-Kitâb Press, 1406/1985.
- 456 **Ibn Hazm** 'Alî Ibn Ahmad Ibn Sa'id. Al-Ihkâm fî Usûle Al-Ahkâme. Cairo, Egypt: Dâr-Al-Hadîth Press. Volume 8, 1404/1984.
- 476 **Ash-Shirâzî** Abû Ishâq Ibrâhîm Ibn 'Alî. Tabaqât Al-Fuqahâ'. Verified by 'Ihsân 'Abbâs. Beirut, Lebanon: Dâr ar-Râ'id Al-'Arabiy Press, 1<sup>st</sup>. ed., 1389/1970.
- 478 **Imâm Al-Haramain Al-Juwiynî**. 'Abdul-Malik Ibn 'Abdullâh Ibn Yusuf ash-Shafî'iy. Al-Warqât. Verified by Dr. 'Abdul-Lâtîf Muhammad Al-'Abd.
- 478 **Imâm Al-Haramain Al-Juwiynî**. 'Abdul-Malik ibn 'Abdullâh ibn Yusuf ibn Muhammad. Al-Gheyâthî Gheyâth Al-Omam fî at-Teyâth az-Zulam. Verified by 'Abdul-'Azîm Ad-Dîb. Imâm Al-Haramin Press. 2ed. 1401/1981.

- 502 **Ar-Râghib Al-Asfahâniy** Al-Hasan Ibn Muhammad. Al-Mufradât fî Gharîb Al-Qur'ân. Damascus: Dâr Al-Qalam Press, 1<sup>st</sup>. ed. 1412/1982.
- 505 **Abû Hâmid Al-Ghazâlî** Muhammad Ibn Muhammad Ibn Muhammad. Al-Mankhûl fî Ta'liqât Al-Usûl. Verified by Dr. Muhammad Hasan Hîtô. Damascus: Dâr Al-Fikr Press, 1400/1980.
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